

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

)	CIVIL FILE
Donald Sanders,)	NO. 17-CV-5106 (ECT/KMM)
)	
Plaintiff,)	
)	VOLUME VII
vs.)	
)	
BNSF Railway Company,)	Courtroom 3B
)	Tuesday, December 14, 2021
Defendant.)	St. Paul, Minnesota
)	8:05 A.M.

JURY TRIAL PROCEEDINGS

**BEFORE THE HONORABLE ERIC C. TOSTRUD
UNITED STATES DISTRICT JUDGE
AND A JURY**

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1 (8:05 a.m.)

2 P R O C E E D I N G S

3 I N O P E N C O U R T

4 (Without the jury)

5 THE COURT: Good morning, everyone. Please be
6 seated.

7 Has everybody had a sufficient opportunity to go
8 through the jury instructions?

9 MR. JIM KASTER: We have, Your Honor.

10 MS. DONESKY: Yes.

11 THE COURT: Okay. Great.

12 Let's start with -- obviously I intend to --
13 Instructions 1 through 7 are instructions that I've given
14 before trial and during trial, so following closing
15 arguments I would intend to pick up with Instruction No. 8.
16 Let me just confirm that with respect to these first few
17 there are no objections.

18 So how about Instruction No. 8? Any objections on
19 the plaintiff's side?

20 MR. JIM KASTER: No, Your Honor.

21 THE COURT: BNSF?

22 MS. DONESKY: No.

23 THE COURT: And 9?

24 MR. LUCAS KASTER: Your Honor, if I could, I just
25 wanted to raise one issue. I just saw this.

1 THE COURT: Yeah.

2 MR. LUCAS KASTER: In Instruction 7 you reference
3 Ms. Eggertsen's depo being read, but I think Mr. Jensen's
4 depo was also read.

5 THE COURT: So I'm getting to that.

6 MR. LUCAS KASTER: Okay.

7 THE COURT: That instruction I read during trial,
8 and one of the things I'm going to do is give the jury
9 everything that I read already. I have a separate
10 instruction that comes later that is redundant of that, I
11 understand that, but I don't know as I have much of a choice
12 if I'm going to follow my usual practice, and I'm not sure
13 quite how to handle that otherwise. I mean, I suppose in
14 theory we could take Instruction 7 just out completely, but
15 if I'm telling the jury I'm giving them everything that I've
16 given them so far, I suspect I ought to leave that in.

17 All right. But let's revisit that issue when we
18 get to the -- what I'm labeling the redundant instruction.

19 All right. So how about 9? Plaintiff?

20 MR. JAMES KASTER: No objection, Your Honor.

21 THE COURT: BNSF?

22 MS. DONESKY: No, not to 9.

23 THE COURT: Ten. Plaintiff?

24 MR. JAMES KASTER: No objection, Your Honor.

25 THE COURT: BNSF?

1 MS. DONESKY: Ten is fine.

2 THE COURT: How about 11?

3 MR. JAMES KASTER: No objection, Your Honor.

4 THE COURT: BNSF?

5 MS. DONESKY: That's fine.

6 THE COURT: And then 12. That's the more generic
7 deposition at trial which would account for Mr. Jensen. And
8 I don't know that anybody's intending to appear by
9 deposition today, but it would account for that in the event
10 that that happens.

11 MR. JAMES KASTER: We have no objection, Your
12 Honor.

13 THE COURT: BNSF?

14 MS. DONESKY: That's fine. Yeah, other than it
15 being slightly redundant, I don't think there's harm in
16 putting another one in.

17 THE COURT: All right. 13. Let's start with
18 Plaintiff.

19 MR. JAMES KASTER: Your Honor, our objection to 13
20 is as to the last sentence on page 19. I believe that is
21 argument.

22 THE COURT: The last sentence on page 19?

23 MR. JAMES KASTER: That's correct.

24 THE COURT: Okay.

25 MR. JAMES KASTER: It begins: "You may not,

1 however, find that BNSF firing Mr. Sanders was due in whole
2 or in part to every single one of the track defects he
3 reported," and the sentence goes on. I don't need to read
4 the rest of it, but I believe that is argument and they will
5 make that argument and are free to make that argument.

6 THE COURT: The reason it's there -- so not
7 objecting that it's argumentative, objecting that it's
8 argument and unnecessary.

9 MR. JAMES KASTER: Correct.

10 THE COURT: Okay. The reason it's there is
11 because as to that piece of the case, I entered summary
12 judgment. You argued at summary judgment that every one of
13 the track defects Mr. Sanders ever entered, that a jury
14 should get to decide whether BNSF retaliated against
15 Mr. Sanders for a career-long, a BNSF career-long practice
16 of entering these slow orders, reporting track defects,
17 et cetera, and I very clearly in one paragraph said that's
18 out of the case.

19 And I think it's important for me to make sure the
20 jury understands that that theory of the case is out. I
21 don't intend to tell them I entered summary judgment against
22 it, I don't intend to tell them anything more, but I think I
23 need to include it for that reason.

24 MR. JAMES KASTER: I understand what the Court is
25 saying and your explanation is -- it seems fair to me. It

1 does feel to me like argument -- argument that counsel may
2 make. And the thing that -- I think the Court could handle
3 that same issue by not allowing us to make an argument to
4 the jury that would be inconsistent with the summary
5 judgment ruling, which I think would also be fair. This
6 sentence strikes me as surplusage.

7 THE COURT: So I thought about that and I have to
8 sort of call to mind why I thought that was not as wise an
9 alternative. I think the reason I thought that wasn't as
10 wise an alternative is because as the evidence has come in
11 and I have listened to it, it seems to me that the evidence
12 has been presented in such a way, regardless of what you
13 argue at closing, that unless the jury's instructed
14 otherwise, they would sense that that is an acceptable basis
15 upon which to find BNSF liable.

16 MR. JAMES KASTER: I have nothing further to add
17 on that, Your Honor.

18 THE COURT: Okay. So I understand the objection
19 and I'll candidly admit that, you know, I'm not sure this is
20 the -- I am not absolutely certain that this is the best way
21 of handling it. I have given the matter some thought and
22 I've come to the judgment that it is, but as I say, I'll --
23 so I'm going to leave that sentence in there. It is the
24 reason, by the way, that I cite the summary judgment order
25 at the end of the thing for authority.

1 Apart from that, does Plaintiff have objections to
2 this instruction?

3 MR. JAMES KASTER: No, Your Honor.

4 THE COURT: Okay. How about BNSF?

5 MS. DONESKY: Thank you, Your Honor.

6 Our objection begins with -- and it flows through
7 the instructions, so I'll sort of compartmentalize it in one
8 objection, but it flows to other instructions as well -- is,
9 the first element as to good-faith protected activity, we do
10 not believe that it conforms with the statute, 20109, in the
11 sense that it appears to be broadening the types of
12 protected activity that would qualify as legally protected
13 activity under the statute.

14 I don't believe that the mere entering of a slow
15 order, removing a track from service, refusing to violate
16 any safety-related law, I don't believe that's the law of
17 the statute. I believe the standard is higher than that.

18 And I would add that refusing to violate a
19 safety-related law -- I'm just trying to pull it up on my
20 computer. I don't think they pled the refusal claim in the
21 beginning, so I don't know that that's even been exhausted.
22 But our primary objection is that the mere reporting of a
23 track defect, entering a slow order, or removing track from
24 service could -- it's far broader than the statute's
25 requirements, including reporting concerns to BNSF human

1 resources about the same.

2 And I'll give an example of that to Your Honor and
3 testimony regarding that came in yesterday. The reporting
4 of a track defect or even a slow order could arise from
5 engineering instructions that BNSF has. That's company
6 policy that goes over and above federal law, rule,
7 regulation. It has to be tied to legally protected
8 activity. It doesn't have wording under a (b)(1)(A) for
9 hazardous safety condition. There's no requirement under
10 (b)(1)(A) in this proposed instruction that encompasses
11 that. But if it's under an (a)(1)-type claim, the statute
12 speaks of federal -- a violation of federal law, rule, or
13 regulation, and so I think that broadens it far beyond the
14 statute.

15 THE COURT: Where does (b)(1)(A) say it has to
16 violate the law?

17 MS. DONESKY: I'm trying to pull it up. Does it
18 refer to a federal rule, regulation?

19 THE COURT: No.

20 MS. DONESKY: No?

21 THE COURT: "A railroad carrier," et cetera, et
22 cetera, "shall not ... discriminate for (A) reporting, in
23 good faith, a hazardous safety or security condition."

24 MS. DONESKY: Oh, yeah. That's (b)(1)(A),
25 correct. No, that's true, that's right. I'm thinking of

1 the (a) under the (A) sections.

2 And that was the second point I was making, is,
3 there isn't language of a hazardous safety condition in this
4 instruction such that it's assuming that the mere entering
5 of a slow order, reporting a defect, or removing track from
6 service. It's concluding under this instruction that it is
7 a hazardous safety condition and we believe the jury has to
8 make that determination rather than listing them out in this
9 regard. So that would be my objection to the (b) (1) (A).

10 THE COURT: Well, here's the thing. The pattern
11 instruction says that I should include in that piece of the
12 element, within that element, the specific protected
13 activity in which Plaintiff's alleged to have engaged by
14 reference to facts; in other words, not generically. And on
15 the one hand, I guess I thought that that seemed important
16 from the perspective that there have been activities that
17 have been referred to here that -- let me take that back.

18 Well, put it this way: How would BNSF revise that
19 to then fix that problem --

20 MS. DONESKY: Well --

21 THE COURT: -- and still incorporate facts?

22 MS. DONESKY: Right. And no, it's a challenge
23 because in part there has been no identification of -- I
24 mean, read this way, it could be read to the jury that the
25 day before he was removed from service on the hearings, if

1 he reported a track defect or entered a slow order, which he
2 probably did because that was his job, there's no time frame
3 on what the protected activity is here. Normally you have a
4 defined and identified legally protected activity, and here,
5 the mere fact of him reporting any of these things every
6 single day up until he was removed from service. And so I
7 think it's very confusing and risks prejudice to the jury
8 because. I mean, I understand the challenge in part because
9 the way, obviously, that this part of the case has been --
10 there aren't defined identified activities aside from him
11 doing his job. There aren't dates at which he reported a
12 particular slow order that has been argued that it was the
13 protected activity.

14 MR. JAMES KASTER: Your Honor, can I be heard on
15 this?

16 THE COURT: Yes.

17 MR. JAMES KASTER: As the Court notes, the guide
18 suggests incorporating facts in here, not just giving the
19 jury statutory language. The Court has already instructed
20 the jury that the panoply of protected activity, or arguable
21 from the plaintiff's perspective protected activity, is not
22 at issue. Then that informs this specific instruction and
23 the jury needs to appreciate what it is we're talking about.

24 Obviously, as it relates to the hazardous safety
25 or condition, subdivision (a) says reporting in good faith a

1 hazardous safety or security condition, and specifically,
2 that's -- the evidence is crystal clear. Every witness who
3 was asked said that these requirements are provided for by
4 the FRA and that when there is a defect and when a slow
5 order has to be entered or a track has to be removed from
6 service, that Mr. Sanders is acting pursuant to law by doing
7 that. That is protected activity. That's the specific
8 protected activity at issue, and I think this -- and going
9 to human resources is also protected activity as long as
10 Mr. Sanders has done that in light of the Court's
11 restriction about that, about pressure he received not to
12 enter slow orders or report defects.

13 That's exactly consistent with the evidence and
14 provides the jury a factual context under which they can
15 decide what is protected activity here. Instead of just
16 reading the statutory language, this informs the jury about
17 how they make that decision. I think that's appropriate
18 given the context of the court limiting earlier the
19 instruction that's not every single time, as Counsel has
20 said.

21 THE COURT: Let me just make one point and then,
22 Ms. Donesky, I'll come back to you.

23 MS. DONESKY: Certainly.

24 THE COURT: The point is that with respect to the
25 concern everything Mr. Sanders did is protected activity and

1 that forming a basis for his claim here, I think I cover
2 that in the last sentence on page 19, the last sentence of
3 the fourth element.

4 I am inclined to stick with what's there in the
5 description of the first element. If you have some path or
6 suggested revision to it, that would be faithful to the
7 factual basis for Mr. Sanders' claim and the law. I'd
8 certainly consider it. But without more -- I really had a
9 hard time figuring out how else to draft that first element
10 and I spent a fair amount of time with the statute here and
11 with our summary judgment order going back and reminding
12 myself of what we concluded was at issue in this trial.

13 MS. DONESKY: One remark to Counsel's remarks that
14 any track defect, or slow order, or removing track from
15 service is automatically a hazardous safety condition, I
16 think the facts of the record would dispute that and I think
17 the statutory language requires the jury to determine
18 whether the activity he engaged in constitutes a hazardous
19 safety condition.

20 FRA provides minimum standards, but just because
21 there's minimum standards out there does not mean it's a
22 hazardous dues safety condition necessarily. I think that's
23 a jury question as to whether what he reported were in fact
24 hazardous safety conditions. And so that was the wording we
25 had proposed and -- I mean, certainly at minimum, to the

1 extent the refusal to violate any safety-related law -- and
2 I'm trying to pull up the complaint, because I want to make
3 sure they've exhausted this claim, if it's an (a)(2) claim,
4 I believe at the minimum it would have to say "to refuse to
5 violate any federal law, rule, or regulation relating to
6 railroad safety or security," because I don't believe any
7 safety law is 20109. I think it only applies to, as the
8 statute says, any federal law, rule, or regulation. So that
9 was the reference I was trying to refer to earlier.

10 THE COURT: (a)(2) says that.

11 MS. DONESKY: Correct. It's the -- right.

12 MR. JAMES KASTER: Your Honor, as it relates to
13 the definition of a hazardous safety or security condition.
14 Nothing needs to be proven more than the fact that the FRA,
15 the Federal Railway Administration, has a regulation that
16 governs this. Those regulations are designed to identify
17 and define what is a hazardous safety condition on the
18 railroad. If you have a violation of the FRA, by virtue of
19 that fact alone, you have a hazardous safety condition as
20 defined by law, or rule, or regulation pursuant to law.

21 (Pause)

22 THE COURT: The model instruction gives as an
23 example of inserting protected activity. Example, quote,
24 "notify defendant of Plaintiff's work-related personal
25 injury."

1 MS. DONESKY: That's an (A) (4) claim. That was
2 part of the amendment to the statute back in -- it's a
3 specific -- yeah, (A) (4) provides for that.

4 THE COURT: Got it.

5 MS. DONESKY: Yup.

6 THE COURT: So one thing I noticed that that does
7 is it does quote the statute.

8 MS. DONESKY: Correct, which is why our proposed
9 instruction simply says for reporting a hazardous safety
10 condition under (b) (1) (A), because that's for the jury to
11 determine if that person has in fact reported a hazardous
12 safety condition or -- I think -- it matches the wording of
13 the statute. And I interpreted the pattern instruction to
14 be getting at that, which provision, which portion of 20109
15 has been pled. And so it's either -- to your point, Your
16 Honor, did they report a work-related injury that's an
17 (A) (4) claim. If it's reporting a hazardous safety
18 condition, that's a (b) (1) (A) claim. And I believe that's
19 all of it that that pattern is getting at, as opposed to the
20 more specific factual details here.

21 THE COURT: Okay. Then let's say that I'm going
22 to contemplate that edit.

23 MR. JAMES KASTER: Your Honor --

24 THE COURT: Just one second. Let me ask a
25 question and get an answer to that and then give you an

1 opportunity, Mr. Kaster.

2 What subdivisions are at issue here? As I
3 understand it, it's (a) (1), (a) (2), and (b) (1) (A).

4 MR. JAMES KASTER: That's exactly what I was just
5 going to say, Your Honor. Those are all pleaded claims in
6 the complaint. They were also pleaded in the OSHA
7 complaint.

8 MS. DONESKY: Mr. Kaster, can I just ask, is your
9 (a) (1) where you're deriving the complaints to human
10 resources? It's never been clearly defined under what
11 provision are the concerns brought to human resources fall
12 under the statute.

13 THE COURT: We addressed that in the summary
14 judgment order.

15 MS. DONESKY: Okay.

16 THE COURT: Which is why I suggested everybody
17 take -- one reason among many that I suggest everybody take
18 a careful look at -- sorry, Tim -- take a look at that
19 before today, but let me get it out here.

20 All right. So let me just be sure that I
21 understand this, and then, Mr. Kaster, I want to give you an
22 opportunity to raise a concern about what I think I may do
23 here.

24 We've got (a) (1), (a) (2), and (b) (1) (A). Anything
25 further?

1 MR. JAMES KASTER: (a)(1), (a)(2), and (b)(1)(A).
2 Those are the counts in the complaint.

3 THE COURT: Perfect. All right.

4 Sorry, Mr. Kaster. Go ahead.

5 MR. JAMES KASTER: Well, Your Honor, you know, I
6 haven't scrutinized what protects the complaint to human
7 resources. I'm just looking at the language of (a)(1) and
8 it clearly falls within the ambit of that.

9 As the Court said -- and I don't have that
10 language right in front of me and don't recall what the
11 Court said on summary judgment, but clearly this has been an
12 issue and we've litigated the question of whether or not
13 that -- certainly the jury has heard about his complaints to
14 human resources about being retaliated against for entering
15 track defects, slow orders or removing tracks from service.

16 And clearly it falls within the "provid[ing]
17 information [or] directly caus[ing] information to be
18 provided ... in any investigation regarding any conduct
19 which the employee reasonably believes constitutes a
20 violation of any Federal law, rule, or regulation."

21 We just heard from Dane Freshour yesterday about
22 the fact that the plaintiff complained and he investigated
23 whether or not there were pressures being put -- undue
24 pressures being put on Mr. Sanders because of the fact that
25 he was reporting slow orders. That was the essence of the

1 complaint to human resources both in December and April. So
2 this language is exactly consistent with the factual record
3 that's been developed, and, you know, I'm going to --
4 especially in light of the Court's language in the last
5 sentence, I object to any revision of the language.

6 THE COURT: So two things. One, as to the first
7 concern that you're expressing, I'm all but certain that we
8 addressed in the summary judgment order an argument that the
9 report to human resources was not protected activity within
10 the plain meaning of the statute and we rejected that
11 argument, so that is in play here and I've always understood
12 it to be in play here. I for some reason brought everything
13 else and I didn't bring the darn orders, so let me -- it's
14 okay. I will go back and confirm that. If I am wrong about
15 that -- I want to say that we concluded it fell within --
16 well, I'm not going to guess. I'll look at that and figure
17 it out.

18 All right. So with the proviso that I am
19 contemplating revising the first element of Instruction No.
20 13 to fall more in line with what I upon more careful
21 reflection understand what the model instruction is telling
22 me to do, and in light of BNSF's concerns, I understand,
23 Mr. Kaster, then your objection to that last sentence
24 becomes heightened. I still think that that last sentence
25 is important, but I'll continue to consider that concern in

1 light of the amendment to the first element.

2 Any other objections to -- beyond that issue, any
3 other objections to Instruction No. 13 from BNSF?

4 MS. DONESKY: I'm just reading the fourth element.

5 THE COURT: It would need to be revised as well,
6 obviously.

7 MS. DONESKY: Yes, in the middle part.

8 THE COURT: If I revise the first element.

9 MS. DONESKY: Mm-hm. We would request
10 "intentional" be included again at the end, "but is a
11 pretext to hide [intentional] retaliation."

12 THE COURT: It's in there enough. It's in there
13 once. I'm not going to add it again.

14 MS. DONESKY: I don't see other objections at this
15 time as I'm reading it.

16 THE COURT: Okay. How about 14? Plaintiff?

17 MR. JAMES KASTER: Your Honor, I confess I didn't
18 see that **Monohon** decision. This does doesn't track the
19 language of the statute exactly, but I don't have that
20 **Monohon** decision. I'm not sure where the language comes
21 from.

22 The only objection I have that I would note at
23 this point is saying that "without any intent of fraud"
24 implies to me pristine motives and I think he needs to act
25 in good faith. So I'd just strike the word "any," "without

1 intent to defraud." Other than that, like I said, I haven't
2 seen that decision, so I can't comment on the Court's
3 citation to the **Monohon** case.

4 THE COURT: I don't think "any" is -- "honestly
5 and frankly, without any intent to defraud" is I think a
6 direct quote from that case, in turn quoting Black's Law
7 Dictionary, so for that reason I'm not inclined to take
8 "any" out. I understand the concern. It adds -- the strict
9 grammarian would say that it doesn't add anything.

10 MR. JAMES KASTER: I understand, Your Honor.

11 THE COURT: How about from BNSF?

12 MS. DONESKY: Aside from the same concern on the
13 type of protected activity listed there, we would just
14 reserve our objections which I think we've put on the record
15 regarding just the standard of good faith, as it seems to be
16 in flux on that issue. And **Monohon** isn't finished just yet,
17 but I think we've put our points out there in our proposed
18 instruction and otherwise as to the subjective and objective
19 elements of that and so forth in our other briefing, either
20 -- in our proposed instruction, so I would just preserve our
21 objections on that point.

22 THE COURT: Is there some objection to how **Monohon**
23 has defined good faith?

24 MS. DONESKY: No, I believe that is -- I don't
25 have the decision in front of me, but I believe you've used

1 the same language from that decision.

2 THE COURT: But I mean, is there -- when you say
3 **Monohon** isn't finished yet, is good faith or the panel's
4 definition of good faith an issue that is continuing to be
5 contested?

6 MS. DONESKY: Yes, it is continuing to be
7 contested and I just want to preserve that objection.

8 THE COURT: Okay.

9 MS. DONESKY: Given that the good faith standard,
10 it's a decision that has just been issued, I don't know if
11 it will go *en banc* or to the Supreme Court, but there's a
12 circuit split on the issue, and what good faith is is still
13 at issue, but I understand the Court is adopting or using
14 the current decision, the most recent articulation of the
15 Eighth Circuit law, on that point.

16 THE COURT: Okay. Just curious maybe as much as
17 anything then. Is it BNSF's position in **Monohon** that the
18 good faith standard should be more lenient? In other
19 words --

20 MS. DONESKY: No, I think it would be that -- as I
21 recall, **Monohon** talks about the -- not requiring the
22 subjective element -- or objective and subjective, only
23 subjective is found, and I believe that BNSF would argue --
24 and there is case law supporting it -- that it requires both
25 an objective reasonable concern and subjective. So to that

1 issue, we're just preserving our objections on that.

2 THE COURT: Understood. How about 15? Plaintiff?

3 MR. JAMES KASTER: We put -- part of our brief
4 addressed this issue and I think my concern is the
5 "unreasonable or unfair" given the fact that essentially
6 what we're arguing in part is that the pretext is derived
7 from unfair treatment in part based upon how he was treated
8 with respect to others that we say are similarly situated.
9 So to that extent, the instruction, the business judgment
10 instruction, is misleading here, I think, and I'm concerned
11 about that.

12 THE COURT: How about from BNSF's side?

13 MS. DONESKY: I was just pulling up our proposed
14 instruction. I believe that follows the instruction we had
15 proposed for this rule. I was just --

16 THE COURT: It's a bit different.

17 MS. DONESKY: A little different. Okay. I'm just
18 going to pull them up here.

19 THE COURT: I've seen different versions of the
20 instruction. Some are quite detailed. On the other end of
21 the spectrum you have some that just observe: "You should
22 not concern yourself whether BNSF's decision was" This
23 is intended to focus the jury's attention on the idea that
24 it's not enough for Mr. Sanders merely to establish.

25 MR. JAMES KASTER: And, Your Honor, I would

1 suggest that the language that -- and, you know, obviously
2 I've been in these debates for quite a while about the
3 business judgment rule and what iteration of it and whether
4 an instruction is necessary at all.

5 The only thing that I would say about the
6 instruction is, I feel like the word "unwise" is really what
7 the business judgment rule is designed to address. The
8 wisdom of a business decision is not the issue. When you
9 say "unreasonable or unfair," that encompasses how
10 Mr. Sanders was treated with respect to others and that's
11 where I'm concerned that it might give rise to confusion
12 about how the court -- or the jury, rather -- evaluates this
13 evidence, because it's obviously a pivotal point for
14 Mr. Sanders that he was treated differently than others.

15 THE COURT: I get it. Does BNSF have anything it
16 wants to get on the record with respect to that instruction?

17 MS. DONESKY: I'm just pulling up our proposed
18 instruction.

19 To respond to the three-wording, I think that's
20 consistent with the case law. Just trying to find it here.

21 THE COURT: The **Blackorby** case approved of the
22 quite shortened version of the instruction. I think given
23 that, this instruction goes a little further and would be --
24 I don't know if more compliant -- more likely to be
25 accepted, or at least as likely to be accepted I guess I

1 should say.

2 MR. JAMES KASTER: Your Honor, I'm familiar with
3 cases that suggest that a defendant at least in a Title VII
4 context is entitled to a business judgment rule. The issue
5 is how does that -- and I don't know whether that transfers
6 automatically to a 20109 case.

7 THE COURT: **Blackorby** is that.

8 MR. JAMES KASTER: Yeah. Okay. Fair enough.
9 That's fair enough. The issue to me is language.

10 THE COURT: Right. So **Blackorby** approved of a
11 business judgment rule instruction, uncertain of the
12 verbiage of the instruction because it's not in the panel
13 opinion. We went and actually pulled it from the docket in
14 the Eastern District of Missouri. It's the one sentence,
15 sort of generic: "You should not concern yourself with
16 whether BNSF's decisions were" --

17 MS. DONESKY: Wise.

18 THE COURT: -- "wise," et cetera --

19 MS. DONESKY: Or fair.

20 THE COURT: -- and I thought let's put it in terms
21 of Mr. Sanders' burden and make it clear that it's not
22 enough for Mr. Sanders merely to show, et cetera, et cetera,
23 which is the same as the temporal proximity approach or the
24 approach to that instruction, but I'm still sort of waiting
25 here to make sure that BNSF doesn't -- or if it has an

1 objection it has a chance to articulate it to Instruction
2 15.

3 MS. DONESKY: Aside from -- you know, we had
4 proposed language of a sentence: "It is not unlawful for a
5 company to make employment decisions based on erroneous
6 information and evaluations" in addition to what's there.

7 THE COURT: Yeah. I'm not inclined to include
8 that.

9 MS. DONESKY: Okay. And likewise, I presume the
10 Court is not -- or it considered but did not incorporate
11 the -- rather, your concern is only whether there was
12 intentional retaliation against him for his claim to
13 protected activity.

14 THE COURT: Correct. I think with the inclusion
15 of that intentionality requirement and the basic FRSA
16 elements instruction were covered there.

17 MS. DONESKY: Then just subject to preserving
18 those objections, we don't have anything further.

19 THE COURT: All right. How about 16? Plaintiff?

20 MR. JAMES KASTER: Your Honor, I don't think the
21 instruction is necessary at all. Obviously -- we've put
22 this in our brief, but temporal proximity is a causation
23 feature by itself under certain circumstances. If it
24 doesn't apply, then it doesn't apply. It doesn't create an
25 outside barrier for causation to be proven.

1 THE COURT: How about BNSF?

2 MS. DONESKY: Well, our suggestion was slightly
3 more worded, but I think gets at the point -- again, subject
4 to how our proposed instruction is preserving that, we don't
5 have further objections to the proposed instruction the
6 Court is offering.

7 THE COURT: All right. Mr. Kaster, I'll just say
8 two things or maybe three in response to your concern.

9 I don't believe that I would err by not including
10 a temporal proximity instruction. I agree with you on that.
11 Its inclusion is intended to address two issues.

12 The first is that as we go about in our ordinary
13 daily lives and we see things happen immediately or tomorrow
14 in reaction to what we think happened today, we presume
15 causation, we presume that relationship, and the law is
16 different here.

17 Second, I do think the Eighth Circuit's made it
18 relatively clear -- and it said this in a number of
19 differently employment contexts, the FRSA included -- that
20 it has concerns about district courts -- and then I presume
21 juries -- being tempted to draw that temporal line, or being
22 tempted to find causation merely based upon a temporal
23 relationship, and so I'm trying to address that issue as
24 well.

25 MR. JAMES KASTER: I understand that, Your Honor.

1 I think that the "after that, therefore because of that," is
2 a logical common sense conclusion that people draw and I
3 think it's a fair conclusion to draw. There may be
4 circumstances where it's not a fair conclusion.

5 But yesterday I fell going to my car in the
6 parking lot. Today my knee is sore. I think that
7 connection is logical, and when I wake up at 3 in the
8 morning and my knee is pounding, I think that's probably
9 because I feel today.

10 THE COURT: Well, careful now. You're making my
11 point, right?

12 (Laughter)

13 MR. JAMES KASTER: Well, I --

14 THE COURT: I get it. You're preserving your
15 objection, but you're making my point.

16 MS. DONESKY: But for the fact I was born I
17 wouldn't be sitting here.

18 THE COURT: Yeah. No, I get it. If there's
19 anything else you want to get on the record to preserve that
20 objection, I understand.

21 MR. JAMES KASTER: No.

22 THE COURT: And as I say, maybe the next time
23 around I'll decide that that instruction's not necessary.
24 It seems like a relatively close call, but this time around
25 I'm going to include it for the reasons I've described.

1 Seventeen. Plaintiff.

2 MR. JAMES KASTER: Yeah. Your Honor, this feels
3 like a "What's good for the goose is good for the gander" on
4 similarly situated, so that the instruction should be more
5 clear. And I didn't get a chance to rewrite it, but to the
6 extent that they offer evidence -- and they intend to
7 today, as I understand it -- about others being treated the
8 same as Mr. Sanders when they are reporting to different
9 supervisors in different parts of the country and have
10 different circumstances, I think the instruction needs to be
11 clear that for the jury to consider similarly situated and
12 different treatment, it needs to be applicable to both
13 sides.

14 I also -- and I don't have the language of
15 **Gunderson** right in front of me. In our brief I cited to a
16 quote from the **Ebersole** decision which includes this
17 language: "The comparators need not have committed the
18 exact same offense but must have engaged in conduct 'of
19 comparable seriousness.'"

20 So, I understand the Court's -- and I don't
21 have -- like I said, I don't have **Gunderson** right in front
22 of me.

23 THE COURT: Okay. So I'm fine with that provided
24 the law says that if BNSF is going to rely on comparator
25 evidence, it's its burden to show that those comparators are

1 similarly situated.

2 MR. JAMES KASTER: And both sides to the extent
3 that they rely on comparator evidence should have to meet
4 the same threshold. That's our view. And I think I
5 commented in the brief that if the Court is going to give an
6 instruction, that we would ask that it square up with the
7 **Ebersole** decision. This **Gunderson** language may or may not,
8 I just don't recall, but it should be, as the Court
9 indicates, applicable to both sides.

10 THE COURT: Okay. How about BNSF?

11 MS. DONESKY: We object to that. The case law
12 does not impart the same similarly situated analysis or
13 requirement on the defendant. It is more of consistency of
14 policy and procedures that the case law speaks of in the
15 discipline of other employees. So we would very much object
16 to revision of the instruction to that -- for that point.
17 We believe the instruction as worded is proper as to the
18 plaintiff, but we do not believe it applies to the defense
19 in the manner in which Plaintiff's counsel has indicated for
20 the affirmative defense.

21 MR. JAMES KASTER: Your Honor, I'd like to respond
22 to that.

23 They have the burden once we meet our initial
24 burden to show that they would have made the same decision
25 anyway, and that burden is by clear and convincing evidence.

1 Nothing more needs to be said about their reliance on
2 similarly situated people who are from different parts of
3 the country. That burden clearly informs that this
4 instruction, if given, must be applicable to them as well.

5 MS. DONESKY: We maintain our objection on that.

6 THE COURT: Understood. All right. So I'm
7 inclined -- here's what I'm inclined to do on this one.

8 I'm inclined to do what I'll admit I was somewhat
9 surprised a number of the Eighth Circuit model instructions
10 do, which is instruct in the passive voice, so put the
11 instruction passive voice and in that way make it applicable
12 to any party that seeks to introduce comparator evidence.
13 And I will put together something along those lines and get
14 it out to everyone so that you've got an opportunity to
15 review it and get objections on the record.

16 All right.

17 MS. DONESKY: Can I just include one additional
18 objection, that there's affirmative defenses case law met
19 without any other employee evidence whatsoever, and I would
20 think that this instruction almost leads that requirement to
21 require that. And as I said before, I think it's a
22 consistency of policy rather than the similarly situated
23 requirement that's reflected in this instruction for
24 preserving the record.

25 MR. JAMES KASTER: That might be true in a

1 hypothetical sense. They're offering evidence today about
2 other people from different places around the country and
3 different circumstances.

4 THE COURT: Understood.

5 All right. How about Number 18? Plaintiff.

6 MR. JAMES KASTER: The only -- the Court added
7 this language which I think is actually helpful, the
8 "independent obligation" language, and that wasn't in our
9 proposed instruction.

10 The thing that I was concerned about with respect
11 to the OSHA, my language was intended -- the language in our
12 limiting instruction was intended to be short so that it
13 didn't, you know, consume too much space, but I included
14 language from the case the Court cited us to:

15 "They are merely steps in the procedure and not
16 findings by a preponderance of the evidence on the issues
17 before you."

18 I included that even though it's the OSHA
19 determination that's merely a step in the procedure and the
20 union grievance procedure, that is not a decision on the
21 issue before you.

22 So the language might be too all-inclusive, but I
23 do think it's helpful for the jury to know that. And given
24 that and given where we are in the record in terms of
25 offering this evidence, that's the only thing I would add, a

1 sentence that just explains that.

2 I think the record is clear that as it relates to
3 the union grievance procedure, the record that is the part
4 of the investigative hearing is the record that goes up
5 through these various steps and then to the arbitrator to
6 make a decision. It's not a new record. And so that
7 record, I think is clear, is not governed by the rules of
8 evidence, it's not governed by the rules of procedure, not
9 the rules that govern this proceeding.

10 So that's why I thought a sentence about
11 preponderance of the evidence, but it might be simply that
12 we'd say that it's not governed by the rules of procedure or
13 the rules of evidence. The OSHA determination is in fact
14 merely a step in the process. So I tried to encapsulate
15 that in one sentence, but I do think it's important that the
16 jury understand that.

17 Having said that, I appreciate the Court's
18 language in the last sentence about an independent
19 obligation.

20 THE COURT: How about BNSF?

21 MS. DONESKY: No objection to the proposal.

22 THE COURT: Okay. I'm going to stick with it as
23 is.

24 Mr. Kaster, I understand your concerns. We could
25 go on for a couple of pages to describe the differences and

1 I'm sort of expecting you all will do that in closing.

2 MR. JAMES KASTER: Your Honor, I will want to make
3 sure that we don't have to object during closing argument to
4 what I would consider to be an improper argument; that is
5 that the decision that the jury has made is somehow -- that
6 it has before it has somehow been decided in some other
7 forum, because it's not the same decision and I would object
8 to that kind of an argument.

9 THE COURT: If the argument is that a decision's
10 been made and you don't have anything to add to it or
11 something that suggests to the jury that they really don't
12 have any sort of independent obligation here to review this
13 issue *de novo*, then I think that objection would be
14 well-taken.

15 MR. JAMES KASTER: And I think it would be our --

16 THE COURT: It's a gray line, right? Sorry to
17 interrupt, but it's not a bright line.

18 MR. JAMES KASTER: I understand what the Court is
19 saying. The independent -- what we would intend to argue
20 consistent with the evidence is that the only hearing that
21 the plaintiff has had where he has been allowed to even
22 appear and examine witnesses was this investigatory hearing,
23 that there has been no other hearing on the evidence.

24 THE COURT: All right. Nineteen. Plaintiff?

25 MR. JAMES KASTER: We don't object to 19.

1 THE COURT: And BNSF, I assume you object for the
2 same reasons as before and, as I said, I'm reconsidering
3 that.

4 MS. DONESKY: Correct.

5 THE COURT: Apart from that, any objection?

6 MS. DONESKY: I was just tracing it. We had
7 requested that the -- "would identify that BNSF would have
8 fired Mr. Sanders for misconduct and theft of time" to give
9 a description of what the dismissal was for "even if
10 Plaintiff had not engaged in the alleged protected
11 activity."

12 THE COURT: I did not see that in the pattern
13 instruction, so I didn't include it for that reason, but I
14 understand that objection and it's on the record.

15 MS. DONESKY: Aside from preserving our objections
16 to the proposed instruction that had more language in terms
17 of what the factors were, we'll just preserve those
18 objections in the proposed instructions.

19 THE COURT: All right. How about 20?

20 MR. JAMES KASTER: We have no objection.

21 THE COURT: BNSF?

22 MS. DONESKY: I don't believe that the last
23 sentence is necessary. It seems like more than necessary to
24 add the sentence of: "Clear and convincing evidence
25 requires a higher degree of persuasion than the greater

1 weight of the evidence." It seems to be self-evident from
2 the definition itself above it.

3 THE COURT: That's right out of the pattern
4 instruction, so I'm going to leave that in.

5 I will observe just real briefly about that
6 instruction. Many include it before a discussion of the
7 elements of the claim and the affirmative defense. I think
8 it makes more sense. At least yesterday and at this moment
9 I think it makes more sense to include it at the end where
10 after we've already sort of described the various burdens in
11 the context of the instructions than putting it up front
12 before we get there.

13 All right. Actual damages, the last instruction,
14 Number 21. Plaintiff?

15 MR. JAMES KASTER: No objection from the
16 plaintiff.

17 THE COURT: Defendant?

18 MS. DONESKY: It seems to model after the
19 instruction. None here.

20 THE COURT: Okay. Great. Here's what I will do.

21 We will work as expeditiously as we can on any
22 edits, push those out so that everyone can see them either
23 on morning break or at noon and then discuss these over the
24 lunch hour prior to closing, prior to when I anticipate
25 you'll be doing closings and try to keep it moving as best

1 we can that way.

2 MS. DONESKY: Has the Court rejected emotional
3 distress damages as a separate instruction?

4 THE COURT: I have. Apart from emotional distress
5 being mentioned specifically and what's required to support
6 it being mentioned in the context of Instruction 21, yes.

7 MS. DONESKY: So we'd be able to -- or do you want
8 me to make argument now on that, that it should have
9 additional language?

10 THE COURT: I think if you've got an objection to
11 the non-inclusion of that instruction, you should get that
12 on the record now.

13 MS. DONESKY: Language such as: "Plaintiff must
14 prove that he has suffered a specific discernible injury
15 with credible evidence, hurt feelings, anger, and
16 frustration are a part of life and are not the types of harm
17 that could support a mental anguish award."

18 MR. JAMES KASTER: Your Honor, that language --

19 THE COURT: Correct. I'm not going to include
20 that.

21 MS. DONESKY: We'll preserve our objections on
22 that.

23 THE COURT: Okay.

24 MR. JAMES KASTER: I'm not even sure that's the
25 law in the Fifth Circuit anymore, but it's a citation to a

1 Fifth Circuit pattern instruction that I think is quite
2 dated.

3 THE COURT: Okay. Well, I appreciate the
4 thoughtful discussion on this. We'll get to work so that
5 we're in a position to keep this moving. We'll just recess
6 for just a couple of minutes for us to get back, plot a
7 couple things out, and we'll get the jury back in here. I
8 expect we'll start up at ten after 9:00, if that's all
9 right.

10 MR. JAMES KASTER: Certainly.

11 MS. DONESKY: Your Honor, just for the record, can
12 I presume that any, like, honest belief instruction or other
13 instructions we proposed have been rejected by the Court
14 such that I can just make a record that we preserve those
15 objections?

16 THE COURT: Yes.

17 MS. DONESKY: Thank you.

18 THE COURT: We will discuss logistics for tomorrow
19 morning at the end of the day today. As you might expect,
20 you know, this courthouse could be -- will be inundated with
21 folks tomorrow morning, but as I say, we'll discuss that in
22 the presence of the jury at the end of the day today and
23 we'll sort of see where we're at.

24 MR. JAMES KASTER: Your Honor, can I ask, do we
25 have an issue with one of the jurors?

1 THE COURT: No, I do not -- not as far as I know.

2 MR. JAMES KASTER: Okay. I just was -- there was
3 some movement yesterday that made me think that we had --
4 one of the jurors had an issue, but --

5 THE COURT: What kind of an issue?

6 MR. JAMES KASTER: Like a scheduling issue or
7 something like that.

8 THE COURT: She -- we can go off the record.

9 (Discussion off the record)

10 MS. DONESKY: Your Honor, the only other thing, I
11 think, is the special verdict form, if I can just at least
12 lodge an objection. But I believe the special verdict form
13 would typically be divided between the claim of the
14 plaintiff and then only if found to have met his claim that
15 a separate question, as our proposed verdict form suggested,
16 where the defendant -- there'd be a Q and A for the jury to
17 answer if the defendant has met its affirmative defense, as
18 two separate questions. We think that is a manner in which
19 we would have more informative answers to what the jury --
20 how the jury decided as related to the two different claims.

21 THE COURT: Okay. I will think about that.

22 MS. DONESKY: Okay. Thank you.

23 MR. JAMES KASTER: And we like the verdict form.

24 THE COURT: Understood. Okay.

25 All right. We'll recess for just a few minutes.

1 We will recommence here just a little bit before 9:15.

2 (Recess taken at 9:08 a.m.)

3 * * * *

4 (9:15 a.m.)

5 IN OPEN COURT

6 (Jury enters)

7 THE COURT: Please be seated, everyone.

8 Members of the Jury, good morning. I had the
9 opportunity to confer with the lawyers following our
10 business yesterday and here is where I understand that we
11 are at.

12 We expect to complete witness testimony today, we
13 expect the lawyers to have an opportunity to present closing
14 arguments today and I also expect to be able to instruct you
15 today. Whether we'll have enough time for you to begin your
16 deliberations today or not I can't say for sure, but that is
17 where we are at, so I think things are on schedule. The
18 train is running on time, so to speak.

19 (Laughter)

20 THE COURT: All right. Is BNSF prepared to call
21 its witness?

22 MS. FERGUSON: Yes, Your Honor. We would call
23 Andrew Shearer.

24 THE COURT: Mr. Shearer, why don't you come up
25 here and if you could, sir, stand in between that railing

1 and the witness chair, and if you could face the courtroom
2 deputy, I'll invite her to administer the oath at this time.

3 COURTROOM DEPUTY: Please state your full name for
4 the record, spelling your first and last name.

5 THE WITNESS: Andrew Lee Shearer. Andrew is
6 A-N-D-R-E-W, Shearer is S-H-E-A-R-E-R.

7 COURTROOM DEPUTY: Please raise your right hand.

8 **ANDREW L. SHEARER, DEFENDANT'S WITNESS, SWORN**

9 THE COURT: Thank you, Mr. Shearer. Please
10 have a seat.

11 Ms. Ferguson?

12 MS. FERGUSON: Thank you.

13
14 **DIRECT EXAMINATION**

15 BY MS. FERGUSON:

16 Q. Good morning, Mr. Shearer. If you're comfortable, you
17 can take off your mask for the testimony.

18 A. I'm comfortable.

19 Q. Thank you. Where do you work?

20 A. I work in our Fort Worth headquarter campus for BNSF
21 Railway.

22 Q. And what is your position there?

23 A. I'm the director of engineering planning.

24 Q. What does that mean?

25 A. What that means is I do a lot of things for our

1 engineering team, so track signal structures that is
2 involved in reviewing our business process, and then I get
3 involved with our technology team to build applications that
4 we use to report to do the work. I get involved with the
5 reporting team to be able to take the information that we
6 take out and produce information that our field teams will
7 be able to use to fix conditions in the track. And then I
8 also have a liaison job with our government agencies, so
9 federal regulations for FRA, Transport Canada, et cetera,
10 and I also lead our engineering vehicle team, so I have a
11 thousand vehicles that roll up to me.

12 Q. When did you begin your career at BNSF?

13 A. I'm just shy of 18 years with the company, so I began in
14 early 2004.

15 Q. Okay. Tell us your various stops along the way to your
16 current position.

17 A. Sure. Yeah, it's been a very interesting journey.

18 I came in through what's called our EFLS, or
19 Experience Front Line Supervisor program. My first job was
20 assistant roadmaster of new track construction and I built a
21 lot of track out in the coal fields.

22 And then from there I became what's called a
23 roadmaster, which is responsible for the maintenance of a
24 given territory, probably three, four or five subdivisions.
25 I did that at two separate locations. I was a roadmaster in

1 Wyoming and a roadmaster up in Grand Forks, North Dakota.

2 From there I took a job with what's called MRP, or
3 Manager of Roadway Planning. That's the position that we
4 use that looks at a lot of the data, does a lot of things
5 from geometry cars and builds a capital program for the next
6 couple of years of the capital maintenance that we'll do on
7 a territory.

8 From there I took a job as a division engineer, or
9 a DE role. And what that is, is the next level of manager
10 over the roadmasters, or over the FLS, and responsible for a
11 larger component of the territory, and sometimes that'll
12 span two, three states in some locations.

13 And then from there I went to the Fort Worth
14 campus and I did a job called Director of Best Way
15 Engineering, and that one was involved in planning the
16 maintenance cycles that we would do, so I did a lot on the
17 planning front.

18 And from there I got into this now reporting and
19 building processes and tools to continue that part of my
20 career.

21 Q. Thank you. I want to talk with you today about two
22 topics. The first topic is scorecards. That's a term
23 that's been talked about throughout this trial.

24 Can you tell the jury what is a scorecard?

25 A. Sure. Yeah, okay. So a scorecard is one of the many

1 tools that we use at BNSF, and I would explain it this way
2 to somebody that's not familiar with it.

3 It's kind of a one-stop shop report that we use to
4 give to the managers so they can understand basically the
5 health of a part of a territory, how well that portion of
6 the railroad is performing, and it has a lot of the key
7 metrics that we feel are important, that if you manage those
8 and watch those and understand what's going on behind those,
9 that you're going to do okay and the territory will be just
10 fine.

11 Q. Just generally, how does BNSF use a scorecard?

12 A. So generally how we use it is, it's one of many
13 documents that we look at like I talked about. It's a tool
14 that pulls together those key metrics. And then probably
15 once, twice a year as a typical average, that folks would
16 look at that to understand kind of how the territory is
17 running.

18 Q. Have you had a chance to look at the scorecard for the
19 Twin Cities division in 2016?

20 A. Yes, I have.

21 MS. FERGUSON: Could we see Exhibit P-149, please.

22 THE WITNESS: We'll be able to blow that up,
23 right?

24 THE COURT: Has it been admitted?

25 MR. LUCAS KASTER: We have no objection.

1 THE COURT: All right. It's admitted and may be
2 published.

3 MS. FERGUSON: Maybe you could highlight the first
4 category beginning "Safety" down to "Final Score." Thank
5 you.

6 BY MS. FERGUSON:

7 Q. So we see categories here: "Safety," "Budget,"
8 "Service." What's the significance of those categories?

9 A. Those categories would be the top three things that we
10 considered as being most important to managing a territory.

11 The safety -- and I'm sure we'll get into it here,
12 so I won't go too far, but it's just really the safety
13 component. There's nothing more important than what we do
14 day-to-day that impacts safety.

15 Budget is on the scorecard there.

16 And then, of course, service, comprised of those
17 various components.

18 Q. So under "Service" we see "Corridor," "Slow Order
19 Delays," correct? What's the significance of that?

20 A. So slow order delays from a high-level on the railroad,
21 we sell a business of moving freight, and I like to always
22 use the analogy of like Chicago to Pacific Northwest.

23 So between those two large cities, all the tracks
24 that comprise that would be made up of the corridor. That's
25 the corridor from Chicago to Pacific Northwest. We sell

1 business to move freight at a certain number of days between
2 those two points. So that's based on the track speed that
3 we maintain on those segments of tracks, and then the slow
4 orders would be conditions on the tracks that don't meet the
5 class of track, which would mean it's not good for the
6 posted speed and we would have to put a slow order on to
7 protect that condition.

8 So the number of delay minutes is what that's
9 measuring to the train. Everything in slow order is done in
10 minutes, and so we would measure how many slow order minutes
11 you have on that corridor.

12 Q. In this particular scorecard there doesn't appear to be
13 an entry there.

14 A. Yeah, correct. If it was not highlighted yellow, it
15 looks like -- I think it's a gray color all the way across
16 there, which would indicate on the scorecard that at that
17 time there either was an issue with that particular
18 measurement or it did not apply at that location.

19 Q. What about the other metrics below "Service"? What, if
20 any, is the significance of those?

21 A. Can you repeat that question or clarify, please?

22 Q. Sure. The other items under "Service," for example,
23 "Unprotected Red Tag Defects." What's the significance of
24 that?

25 A. Okay. Sure. Unprotected red tags. So a red tag is

1 when our geometry cars go across a piece of the railroad.
2 They're measuring constantly for the health of that track,
3 and if there's any condition that car finds that's not good
4 for that particular speed on the track or the health, it's
5 called a red tag defect.

6 And then what we do is we look at from the morning
7 the car ran was there a slow order already in place covering
8 that track defect or that red tag. If there was a slow
9 order in place covering it, it's considered protected. If
10 there was no slow order there, it would be considered
11 unprotected.

12 Q. So, for example, if a track inspector hadn't found that
13 defect and put a slow order on it, that would appear then as
14 an unprotected red tag defect.

15 A. That's correct, yes.

16 Q. Okay. The other categories, "Reportable Rail
17 Incidents," What's that?

18 A. Sure. A reportable rail incident, that's any time that
19 we have an incident that would be on-rail, like a
20 derailment. Could be significant, large number of cars,
21 locomotives involved, could be minor. One single car
22 involved, one wheel drop off. The fact it's reportable
23 means the damage that we incurred met a certain FRA
24 threshold. It was either at that level or above. If it was
25 nonreportable, it would be below that threshold.

1 Q. Okay. Fair to say BNSF would be concerned about things
2 such as a derailment and that would factor into the
3 scorecard under that metric?

4 A. Absolutely, yes.

5 Q. And then below the information, anything there of
6 significance that the jury should know?

7 A. So I think just from a high level to understand how the
8 scorecard works is you see the final score at the top -- or
9 excuse me -- before the "Informational."

10 The Informational are things that we're interested
11 in, things that may have been on the scorecard in the past,
12 but we said we want to focus on safety, budget and service.

13 Then I mentioned this is kind of that one-stop
14 shop report that we use to understand a territory and what's
15 going on in the territory. So some of those things down
16 below there are what we consider important, but just not
17 things that we would focus on at the highest level, but
18 they're certainly on there.

19 And just because we spoke about red tags, I'll
20 highlight this, Repeat Red Tag Defects, which would be one,
21 two, three, four, four lines down is where I'm at. So the
22 repeat red tag is every time a geometry car runs across the
23 railroad, we're always, again, monitoring the health of the
24 railroad and what's going on. If we find the same type of
25 condition, the same defect type, from one run to the next

1 run, we'll call it a "repeat." If it's within a hundred
2 feet and within a one-year time frame of the original
3 defect, we'll call that a repeat and start to drill down
4 and: Okay, what's going on? Do we know what we're doing is
5 we're fixing the track at this location? Is there something
6 else going on at that location? So that's a key thing that
7 we look at.

8 Q. You talked about derailments may have an impact on the
9 scorecard. What other kinds of things may impact a
10 scorecard? For example, what role would weather play,
11 potentially?

12 A. Yeah. So everything that you see on here, this is the
13 scorecard, all of it collectively that's on there.

14 Specific to the question what would weather impact
15 on here, weather would have the potential to drive up our
16 overtime.

17 So we see down underneath "Informational," if
18 we're working a bunch of overtime on the territory, that
19 would drive that metric up. Certainly weather is going to
20 impact your service that's out there, because as the
21 dispatcher, the person in Fort Worth who's running the
22 trains, trying to throw the switches that would change a
23 train from one track to the next one, switches can become
24 bound up, so you see "Switch Reliability" and "Remedy
25 Tickets" under your service metrics.

1 Just the sheer fact that you got all kinds of rain
2 and things going on, the railroad like a road, like a dirt
3 road, would be getting softer over time, so it would impact
4 slow orders and things of that nature as well.

5 Q. Is a scorecard intended to discourage the reporting of
6 track defects?

7 A. No, it's not.

8 Q. Can you explain that?

9 A. It actually would have the opposite effect. If you were
10 not reporting track defects, the geometry car that comes
11 around would be finding those defects for you that were out
12 there. If there was any defect entered and we didn't have a
13 slow order on the location, it would actually be hitting
14 your scorecard metric for unprotected red tags, which from a
15 corporate standpoint, or a division engineer, or a general
16 director, kind of managers of managers, that's one of the
17 key indicator lights that go off that say what's going on in
18 this territory that I've got all these unprotected red tags
19 that allegedly we're not finding with our local team and we
20 have to wait for the geometry car to come and find that
21 defect? There's something wrong with that.

22 Q. Same question as it relates to slow orders. Is a
23 scorecard intended to discourage the reporting or recording
24 of slow orders?

25 A. No, it's not.

1 Q. For the same reasons you said?

2 A. Yeah, same reasons. And I would add on a slow order
3 standpoint, that's one of the reasons or one of the things
4 that we look at as we're planning the capital maintenance.
5 If we don't believe there's a problem in an area, why would
6 we spend the money to fix that area. So it's defects, it's
7 slow orders that tell that health picture of that piece of
8 the railroad and one of the key planning things that we need
9 that's out there, so we encourage slow orders, defects. We
10 want to know what the health of that piece of the railroad
11 is relative to everything else.

12 Q. In your role, do you know how the scorecard rankings are
13 impacted by the reporting of track defects?

14 A. So can we clarify track defects on that question? Are
15 we talking about red tag defects like we've been speaking
16 about, or are we talking about, like, inspector-found
17 defects?

18 Q. Good question. Inspector-found track defects.

19 A. One second here. Let me just review the scorecard.

20 (Pause)

21 Track inspector-found defects are not on the
22 scorecard. The slow order that would be issued on top of
23 the track inspector defect, if appropriate, would be there,
24 but not all track inspector-found defects require a slow
25 order.

1 Q. All right. In your experience -- I think you said you
2 were an assistant roadmaster, a roadmaster, a division
3 engineer. In your experience, does BNSF discourage
4 reporting of track defects?

5 A. No, we do not?

6 Q. And what about the reporting or recording of slow
7 orders?

8 A. No, we do not.

9 Q. If track defects were not reported where the defects
10 actually exist, what's a possible outcome?

11 A. Could you repeat the question for me? I'm sorry.

12 Q. Sure. If a track defect is not reported by a track
13 inspector where a track defect actually exists, what's a
14 possible outcome?

15 A. Yeah. So lots of things. Depending on the severity of
16 the defect, if the track inspector saw something, did not
17 report it, depending on the severity, the worst-case
18 scenario would be a derailment would occur and have
19 catastrophic impacts to -- obviously our ability to run
20 trains through that particular location is out because
21 there's one track and in some locations there's multiple,
22 in some locations everything stops. Huge, huge impact to
23 the railroad to do something like that.

24 Q. That would impact the scorecard significantly, a
25 derailment?

1 A. Yes.

2 Q. Okay. Same question with slow orders. I assume the
3 same thing. If slow orders aren't reported or recorded
4 where they're actually needed, catastrophic outcomes could
5 occur?

6 A. Catastrophic outcomes could occur, yes. It would be the
7 same condition. Ultimately, we want to ensure the track is
8 safe for the passage of trains at the speed that they go
9 over it, both slow orders and defect work together to do
10 that.

11 Q. Now, the second and last topic I want to talk with you
12 about geometry cars. We've heard discussion about those as
13 well. You have some familiarity with geometry cars?

14 A. Yes, I do. As an assistant roadmaster, as an MRP, as a
15 division engineer and as a roadmaster, all my time in the
16 field, so about nine, ten years collectively, was always
17 riding the car, using the information that's on there and
18 helping to plan the division maintenance as I got up there,
19 so multiple roadmaster territories, multiple DE territories,
20 and then my own territory, so many, many times on the car.

21 Q. What is a geometry car?

22 A. So a geometry car, we got a couple different versions of
23 them, but at a high-level, a geometry car is like a
24 passenger train, like you would see almost on an Amtrak
25 train that goes across territory. Very, very highly

1 specialized equipment, all kinds of sensors on there between
2 lasers, accelerometers, tachometers, and systems that
3 measure the track exactly. And it's a big deal for us,
4 because it measures the surface so I understand how that
5 track is sitting in terms if there's cross-level or a
6 condition called a warp or a twist. It measures all of that
7 and it measures it at speeds of up to 70 miles an hour. And
8 with all the technology in the sensors, it measures
9 everything foot by foot across the railroad, so very, very
10 handy piece of equipment for us.

11 Q. Is it meant to be a supplement to the work of the track
12 inspectors who go out and look at the tracks?

13 A. Yeah, absolutely. So a geometry car -- from a corporate
14 standpoint, a geometry car is that -- I'll just call it the
15 normalized data, right?

16 So if I was to teach any one of you how to inspect
17 track and look at it, you may do things differently than the
18 person next to you that's on there. But when that geometry
19 car runs across the territory, it's kind of that single
20 source of truth, if you will, to understand what's happening
21 on this territory versus this territory and we know
22 everything's measured exactly the same way.

23 Q. We have some photographs.

24 MS. FERGUSON: Jan, could you show us D-184,
25 page 2.

1 Q. Do we see a geometry car in this photograph?

2 A. Yes, you do. Obviously the locomotive, the orange
3 thing, is first and then there's what's called a next gen,
4 or a power car, that does some optical pictures -- that's
5 the other thing I haven't spoken about yet -- that will take
6 pictures, high-speed, high-definition pictures.

7 And then the geometry car is the last car on the
8 train with a big picture window out the back, and that's the
9 one that's got all the sensors across it. And the very back
10 portion where you see the large picture window with the
11 stadium seating is where people would sit. And then the
12 front half of that car is where all the computers sit.

13 So, I mean, to give you an idea of the size and
14 the technology running on that thing, the computers that are
15 analyzing the track and doing that are taking up almost half
16 of that car that's in there.

17 Q. What does the middle car do that you referenced?

18 A. Yeah. So it's one of the cars I mentioned. It's a
19 power car, so it's got a lot of the equipment that runs the
20 power to run the geometry car that's on there, and then
21 sometimes they've got what's called the optical technology
22 on that one, so lots of cameras looking down taking pictures
23 of tracks, looking for things like broken rails and so forth
24 that's on there.

25 Q. Is that yet another way to supplement the work of the

1 track inspector to find problems with the track?

2 A. Yes, it is, yeah. BNSF, we do a lot of things and
3 always pushing the envelope of technology there, so optical
4 recognition is one of the additional pieces that we're
5 continuing to improve upon.

6 MS. FERGUSON: Could we see page 3 of that same
7 exhibit.

8 Q. What do we see here?

9 THE COURT: Sorry, Ms. Ferguson. Before we go on,
10 can I just make sure, is there any objection to this
11 exhibit?

12 MR. LUCAS KASTER: No objection, Your Honor.

13 THE COURT: Okay. It's admitted.

14 MS. FERGUSON: We discussed that ahead of time.

15 A. Okay. So this particular picture is of another geometry
16 car. You see the locomotive again. Then there's the power
17 car and then another geometry car in the background. That
18 particular one's a little hard to see, but it looks like
19 that may be one of the ATIP, which is the FRA's version of a
20 geometry car, but it does the same thing.

21 Q. And then page 5 of that same exhibit. What do we see
22 here?

23 A. That's just -- that's one of the sensors on the back of
24 the car. That's the one that I was speaking about that's
25 looking at and measuring the surface of the rail and whether

1 or not there's dips or valleys in it and collecting all that
2 foot-by-foot data that we were talking about.

3 Q. So in addition to -- we have the track inspector's doing
4 the track inspecting, correct?

5 A. Mm-hm.

6 Q. We have geometry cars that are supplementing the work of
7 the track inspectors to find defects, correct?

8 A. Correct.

9 Q. Do we also have the FRA doing their own inspections of
10 BNSF tracks from time to time?

11 A. Yes, we do. We have federal FRA inspectors that'll come
12 out and periodically check the railroad, as well as some
13 states even now have state inspectors that will do that.

14 Q. And if they find defects, they in fact can issue fines
15 for not having found those defects?

16 A. Yes, they do.

17 Q. So was there any incentive for BNSF not to have defects
18 reported?

19 A. No. There's no incentive to BNSF not to report defects.
20 And one of the key measures that the FRA uses on those state
21 inspectors and federal inspectors that come out is, they
22 will pull all of our defect records and try to understand
23 does the number of defects they found during their
24 inspection match the number that BNSF has found during our
25 inspections to understand if we're accurately recording the

1 condition of the track. So the FRA actually measures us
2 against that as well.

3 MS. FERGUSON: Thank you. Those are all the
4 questions I have.

5 THE COURT: Mr. Kaster?

6 MR. LUCAS KASTER: Thank you, Your Honor.

7
8 **CROSS-EXAMINATION**

9 BY MR. LUCAS KASTER:

10 Q. Good morning, Mr. Shearer. My name's Lucas Kaster. I'm
11 one of the lawyers who's representing Mr. Sanders. I'm
12 going to ask you a few questions, okay?

13 A. Okay. Good morning.

14 Q. I want to pick up where you just left off regarding
15 these geo cars. Even though you run geo cars, a track
16 inspector or someone qualified under the FRA regulations has
17 to come go out and confirm any defects found by the geo car,
18 right?

19 A. Yes. We do go out and confirm behind the geometry car.

20 Q. But that's something that's required according to BNSF
21 rules, right?

22 A. We require to inspect the red tags behind the geometry
23 car. We do have other tags like orange tags and yellow tags
24 that are not at that safety threshold yet. Those are not
25 required to do the inspection behind, but red tags, we will

1 go out and validate the geometry car.

2 Q. If we can go to Exhibit 228 at page 12, please.

3 Mr. Shearer, this is a copy or a section of BNSF's
4 engineering instructions, right?

5 A. That is correct.

6 Q. And this section talks about employees inspecting
7 track, when they're doing that they have to have a copy of
8 the last geo car, right, report?

9 A. That is correct.

10 Q. And by the way, geo cars don't run as often as track
11 inspectors are out inspecting the track, right?

12 A. That is correct. A geometry car, if we can Zoom out, I
13 believe this was 2012, right? Yeah.

14 So down in the lower right, the revision
15 January 1, 2012 is what I was looking at. In 2012, we had I
16 believe it was four geo cars and we would average two to
17 three runs across any given part of the network at a time,
18 so call that what, every three months, four months.

19 Q. So two, three times per year.

20 A. Yeah -- I'm sorry -- per year, correct.

21 Q. So, for example, in Dayton's Bluff, a section of track
22 that Mr. Sanders might have been inspecting, the geo car
23 would only travel along that section of track two or three
24 times per year ?

25 A. That would be a fair assumption in 2012, yes.

1 Q. I'm assuming that the geo car doesn't run inside of a
2 yard.

3 A. It'll run in a yard. It just will cover the tracks that
4 are open at that time. So if there's trains parked on
5 certain tracks in the yard, obviously we won't be able to
6 cover those, but it will run in the yard tracks that are
7 open at that time.

8 Q. And the federal regulations regarding -- around track
9 inspection require that a person actually do the
10 inspections, right?

11 A. Correct.

12 Q. The geo car doesn't satisfy the federal regulations.

13 A. The geometry car does not meet the federal regulations
14 for individuals inspecting track, yes, I would say that.

15 Q. Because, for example, the federal regulations depending
16 on the class of track may require an inspection once a week.

17 A. Correct, yes. Depending on class of track, you could be
18 up to once-a-week inspections.

19 Q. Now I want to switch gears and I want to talk to you
20 about this scorecard issue.

21 BNSF has a scorecard for every manager in the
22 maintenance department, right?

23 A. Yes, we do.

24 Q. From -- what's the highest person in the maintenance
25 department? What's their title?

1 A. So the highest department that we would have would be
2 vice president of engineering, who would have the total
3 engineering umbrella, and then it would work down from there
4 to assistant vice president, or chief engineer is another
5 title for those, and then on down from there.

6 Q. So that highest vice president has an overall scorecard.

7 A. Yes.

8 Q. For the entire maintenance department.

9 A. Yes.

10 Q. And then that person's scorecard is broken down to each
11 geographic region within the maintenance department.

12 A. Yes.

13 Q. How many regions are there?

14 A. In 2012, I don't remember right off top of my head.
15 We're about ten right now, to give you idea.

16 Q. And I'm assuming there's a head of each of those
17 divisions.

18 A. Yes, each division would have a maintenance head, which
19 would be our General Director of Line Maintenance, or GDLM.

20 Q. And in Minneapolis or the Twin Cities, that was
21 Mr. Jensen back in 2015. Do you recall that?

22 A. Yes, I do.

23 Q. And then each of those areas under each general director
24 are then broken down to division engineers, right?

25 A. That is correct, yes.

1 Q. And roadmasters, right?

2 A. Among others, yes.

3 Q. So there's other departments as well that are included
4 in the scorecard besides those positions.

5 A. Yes, such as structures and signal. Those would also
6 roll up to your general director of line maintenance.

7 Q. How many employees, or how many managers, how many
8 exempt employees in the maintenance department are subject
9 to the scorecards at BNSF?

10 A. So every manager would have it, and ten divisions --
11 this is an approximation -- call it 300, 400 exempt
12 employees would all be a part of the scorecard.

13 Q. And some of those metrics on the scorecard are broken
14 down to each individual's geographic area, right?

15 A. Yes.

16 Q. And when you get to a roadmaster, it's broken down to a
17 pretty small geographic area, right?

18 A. Yeah. It would be the roadmaster's territory, so
19 whatever subdivisions or portion of the network they're
20 responsible for, yes.

21 Q. And then there's a ranking based upon the score that
22 comes out of the scorecard, right?

23 A. Yes.

24 Q. And there's a ranking for all of those levels of
25 managers, right?

1 A. Yes.

2 Q. And so, for example, the general director of line
3 maintenance in the Twin Cities is put in a ranking with all
4 of the general directors across the network.

5 A. Yes. They're all on the one scorecard report, yes.

6 Q. And they're ranked one through I think you said eight,
7 something to that effect?

8 A. Yeah, somewhere -- I think we're at about ten divisions
9 now, so somewhere ten, 11, 12, depending on the time frame
10 that we were looking at.

11 Q. Same goes down the line. Each division engineer is put
12 in a ranking with their 20 or 25 counterparts and division
13 engineers, right?

14 A. Yes, that is correct.

15 Q. And ranked from one to whatever the number is.

16 A. Yes.

17 Q. Same for roadmasters.

18 A. Yes.

19 Q. And those scorecards and those rankings are maintained
20 and updated throughout the year.

21 A. Yes.

22 Q. And they're posted on BNSF's intranet.

23 A. Yes.

24 Q. So an employee or a manager can go on at anytime and see
25 where they stand from a scorecard perspective, right?

1 A. Within reason. So the scorecard being a one-stop
2 shop -- I'll say it this way: If I come in and look at any
3 point in time, some of the metrics would be updated weekly,
4 some updated monthly, some updated at a different frequency,
5 but at that snapshot you would get a ballpark idea of where
6 you were at.

7 Q. And then the rankings themselves are updated as well,
8 right?

9 A. Yes.

10 Q. On a similar type of schedule.

11 A. Yes, correct.

12 Q. And so, for example, if a manager wants to see where
13 their subordinates are ranking against their counterparts,
14 they can go on the intranet and pull it up.

15 A. They could do that, yes.

16 Q. There's also a dictionary for a scorecard, right?

17 A. That is correct, yes.

18 MR. LUCAS KASTER: If we could pull up Exhibit 24.
19 This is not in evidence yet, so just show it to the witness,
20 please.

21 Q. Mr. Shearer, do you see that on your screen?

22 A. Yes, I do.

23 Q. Is this the 2015 Engineering Scorecard Metric
24 Dictionary? Do you see that at the top?

25 A. Yes, I do.

1 Q. A bit hard to read?

2 A. No, I see it. The title hasn't changed year over year
3 on it. We don't update the title. So the last revision
4 date was March 27 of 2015, so I was just looking to see if
5 there was anywhere the year was identified, but it's not.
6 Yeah, I'll say it's 2015 Engineering Scorecard Metric
7 Dictionary.

8 Q. And by my count this dictionary is 20 pages long. Does
9 that sound about right to you?

10 A. Yes. And it's -- I don't have my glasses, but I believe
11 it says 1 of 20 on the lower right-hand side there.

12 Q. And throughout this page, it provides an explanation for
13 how the various metrics on the scorecards are calculated.

14 A. That is correct, yes.

15 Q. And this dictionary is also available on the intranet?

16 A. That is correct, yes.

17 MR. LUCAS KASTER: Move for the admission of
18 Exhibit 24.

19 MS. FERGUSON: No objection.

20 THE COURT: It's admitted.

21 BY MR. LUCAS KASTER:

22 Q. Thank you. If we could pull up Exhibit 24 just briefly.
23 And why don't we just blow up the frequency metric on the
24 first page, the S-10 right under Safety. I'm just using
25 this as an example.

1 Okay. Mr. Shearer, so each metric that we were
2 just looking at when you were asked questions by Counsel
3 that's listed there has a separate section on here, right,
4 that lays out this information, is that right?

5 A. Yes, that's correct.

6 Q. And then it says "Sponsor," and here it says a
7 Mr. Anderson, right?

8 A. Correct.

9 Q. And so there's an individual person at BNSF who's
10 responsible for each separate metric, right?

11 A. So that one is a little bit different answer.

12 We have one sponsor identified that would gather
13 information about that particular metric that we're
14 measuring, but we do -- everybody in the engineering team
15 gets together about once a year at an event called a Team
16 Week where we would talk about what's going on with the
17 scorecard, are we heading in the right direction, would
18 there be tweaks. And if I had a concern about, let's just
19 say, this frequency or the way it was being measured, I
20 didn't feel it was fair, apples-to-apples comparisons, I
21 would take my concerns to Mr. Anderson and he'd say -- he'd
22 explain how it was set up, why it was set up that way, and
23 if he'd agreed with me, we would then bring it to that Team
24 Week where we could all talk about it.

25 Q. So there's a team of people that is dedicated to

1 deciding what metrics are included on the scorecards --

2 A. Mm-hm.

3 Q. -- is that right?

4 A. Yes, correct.

5 Q. Sorry. You have to say yes.

6 A. Yes.

7 Q. And then there's also a team of people or individuals
8 who are responsible for maintaining each of the metrics
9 throughout the year.

10 A. That's correct.

11 Q. And I think I caught testimony from you earlier that
12 said people look at the scorecard once or twice a year. Did
13 I catch that correctly?

14 A. Yes.

15 Q. Is that accurate?

16 A. From my -- from my understanding of the scorecard that's
17 out there and how often people look at it, it is one to two
18 times a year.

19 MR. LUCAS KASTER: If we could pull up Exhibit
20 106, which is not in evidence.

21 (Counsel confer)

22 MR. LUCAS KASTER: My understanding is Counsel is
23 not objecting to Exhibit 106, 115 or 127.

24 MS. FERGUSON: That's correct.

25 THE COURT: Terrific. They're admitted.

1 BY MR. LUCAS KASTER:

2 Q. If we could pull up Exhibit 106.

3 Mr. Shearer, this is an email an Erin Smith. If
4 we can blow up that top, just the email section of it.

5 Do you know who Ms. Smith is?

6 A. No, I do not.

7 Q. You referenced before there's a "To" line that one of
8 the recipients is Mr. Doug Jensen. Do you see that?

9 A. Yes, I do.

10 Q. And then another recipient is Mr. Keith Jones, right?

11 A. Yes.

12 Q. And the subject in the attachment is "Engineering
13 Scorecard Detail As of April 13th, 2016." Do you see that?

14 A. I do.

15 Q. Why don't we go to Exhibit 115, please. If we can blow
16 up that top section again.

17 Same type of email, one week later, 4-20, 2016,
18 same sender, same recipient, right?

19 A. Mm-hm.

20 Q. Is that a yes?

21 A. Yes. Sorry.

22 Q. If we can go to 127. I'm sorry. I must have the wrong
23 exhibit. If we can go back to 115, please.

24 It's 124. And if we can blow up that top section
25 again.

1 This is same email, same recipients, one week
2 later again, right?

3 A. Yes.

4 Q. So this is an email to managers in the Twin Cities with
5 updated scorecard detail on a weekly basis.

6 A. It appears so. I don't see the attachment or if anybody
7 was actually opening and reading the email, but yes, it
8 appears so.

9 Q. Okay. Well, why don't we go to the second page, please.
10 It's a little bit hard to follow because most of the
11 information is redacted, but you see on the top it says
12 "2016 GDM-TC," General Director of Line Maintenance in the
13 Twin Cities, right?

14 A. That's correct, yes.

15 Q. And if we go down to page 6 of this exhibit, here it
16 actually shows in the Twin Cities East the updated metrics
17 for that week, right?

18 A. So based on whenever this was pulled, I don't see it
19 there, but I mean, it could have been pulled at anytime.
20 It's a 2016 Year Snapshot For General Director of Twin
21 Cities -- and looks like Twin Cities East, the TWCEW.

22 Q. So at least in the Twin Cities, these updated scorecards
23 were being sent on a weekly basis according to these
24 exhibits.

25 MS. FERGUSON: Objection. Foundation.

1 A. There was an email going out, yes, but I haven't seen
2 the attachments or any of that stuff. But yes, there was an
3 email going out with that subject line.

4 Q. You also testified that you don't believe the scorecard
5 in some way incentivizes people not to report the things
6 that are on the scorecard.

7 A. That's correct.

8 Q. If we could pull up Exhibit 107, and I believe --

9 MS. FERGUSON: Objection. Relevance.

10 THE COURT: I'll take a look at it.

11 (Exhibit displayed to the Court and witness)

12 THE COURT: I'll allow the witness to be
13 questioned about it for the moment and then decide the
14 separate question of its admissibility after I hear that.

15 MR. LUCAS KASTER: Great. Thank you, Your Honor.

16 BY MR. LUCAS KASTER:

17 Q. So, Mr. Shearer, if you look at your screen here, and if
18 we can blow up the bottom email just so Mr. Shearer can read
19 it okay. I know it's probably small.

20 This is an email back in April of 2016 regarding
21 some type of derailment that occurred, is that fair? In
22 summary.

23 A. Yes, I'd say that's fair.

24 Q. And then if we go back up to the top email, there's an
25 email from Mr. Jensen dated April 16th of 2016. Do you see

1 that?

2 A. I do, yes.

3 Q. To Mr. Jones.

4 A. Yes.

5 Q. Regarding the derailment at 28th Street, right?

6 A. Yes.

7 Q. And Mr. Jensen writes: "Keep it nonreportable if
8 ours ... shooting for a great year and scorecard points ...
9 let's kick butt."

10 A. Yes.

11 Q. Do you interpret Mr. Jensen's email to be encouraging
12 Mr. Jones to somehow classify this derailment as
13 nonreportable so it doesn't show up on the scorecard?

14 MS. FERGUSON: Objection. Foundation. Calls for
15 speculation.

16 THE COURT: I'll overrule those objections and the
17 prior relevance objection. I'll allow the document to be
18 admitted.

19 A. Can you repeat your question then?

20 BY MR. LUCAS KASTER:

21 Q. Sure. If we can show Exhibit 107, this top email.

22 This is the email from Mr. Jensen to Mr. Jones
23 saying: "Keep it nonreportable if ours," because reportable
24 incidents show up on the scorecard, right?

25 A. Yes, reportable incidents show up on the scorecard.

1 Q. And Mr. Jensen is saying: "Keep it nonreportable if
2 ours ... shooting for a great year and scorecard points,"
3 right?

4 A. That's what it says, yes.

5 Q. Do you interpret that to be Mr. Jensen telling Mr. Jones
6 to classify an incident as nonreportable so it doesn't show
7 up on the scorecard?

8 MS. FERGUSON: Objection. Foundation.

9 THE COURT: Overruled.

10 A. I do not. I know what it says on the screen here, but
11 if you'll just give me time to explain on this.

12 Whether or not a derailment is reportable or
13 nonreportable is set by the FRA with a dollar threshold.
14 There's no control. If I walk out to a derailment and
15 something is damaged beyond repair and has to be replaced,
16 it is what it is. It meets a dollar threshold.

17 Sometimes there are cases where you look at
18 something and is this damaged beyond repair. It's a
19 judgment call.

20 And sometimes you could have an individual out
21 there that says, "You know what? I want the best
22 gold-plated territory I could possibly have as a roadmaster
23 and I want all brand-new things."

24 Your job as a manager over a younger supervisor is
25 to help them see the big picture, right? Not everybody is

1 going to have a brand-new turnout at every location on the
2 territory. So a statement like this from a GDM to a DE
3 could be, as you go out there and you talk to your
4 front-line supervisors, make sure they're making the right
5 call for the right reasons.

6 Q. And I think you were just saying that whether something
7 is reportable or nonreportable is not a judgment call. It
8 either is or it isn't, right?

9 A. Correct. There's a dollar value that controls that,
10 correct.

11 Q. So Mr. Jensen shouldn't be able to tell Mr. Jones, "Keep
12 it nonreportable." It either is or it isn't, right?

13 A. Correct.

14 Q. When you say that people only look at the rankings
15 once -- the scorecard once or twice a year, are you also
16 saying that with respect to the rankings?

17 A. Yes. Most people I've talked to, most people I've
18 worked around with it, had not seen these emails that was
19 out there. Most people align scorecard with two periods of
20 review that we do as a company called performance management
21 review. They're our P&P process.

22 Q. The performance reviews.

23 A. Yup, correct.

24 Q. So managers look at the scorecards and the rankings as
25 part of the performance reviews.

1 A. That's typically the time they would look at it, yes.

2 Q. If we can pull up Exhibit 140 as well.

3 MR. LUCAS KASTER: Counsel can let me know if
4 they're maintaining their objection.

5 MS. FERGUSON: My objection would remain.
6 Foundation.

7 THE COURT: Let's see if the witness can establish
8 the foundation.

9 BY MR. LUCAS KASTER:

10 Q. If we can pull up Exhibit 140, please.

11 Mr. Shearer, this is an email from Mr. Jensen, who
12 you testified before was the general director of Twin
13 Cities, right?

14 A. Correct, yes.

15 Q. To Mr. Jones. Do you know Mr. Jones was a division
16 engineer in the Twin Cities division?

17 A. Yes, I do, that's correct.

18 Q. And it was dated June 24th of 2016, right?

19 A. Yes, correct.

20 Q. And there's a subject line, but no other message in the
21 email, right?

22 A. Correct, yes.

23 MR. LUCAS KASTER: Move for the admission of
24 Exhibit 140.

25 MS. FERGUSON: Objection. Foundation.

1 THE COURT: Overruled.

2 BY MR. LUCAS KASTER:

3 Q. If we can bring up Exhibit 140.

4 This is an email from Mr. Jensen to Mr. Jones
5 congratulating Mr. Jones on the fact that he moved into
6 third place on the scorecards, right?

7 A. Yes, correct.

8 MR. LUCAS KASTER: And then if we could go to
9 Exhibit 142 and just show this to the witness, please.

10 Q. Again, this is an email from Mr. Jensen to various
11 recipients, including Mr. Jones, on July 18th of 2016,
12 right?

13 A. Could I ask for the top to be blown up on this one? I'm
14 sorry.

15 Q. Yes, certainly, certainly.

16 A. Okay. Could you repeat the question just to make sure
17 I'm answering that?

18 Q. Sure. This is an email from Mr. Jensen to various
19 recipients, including Mr. Jones, on July 18th of 2016. Do
20 you see that?

21 A. Yes, I do.

22 Q. And there's a couple paragraphs. I want to focus on
23 the -- it's kind of the bottom half of this top email.
24 There's one that starts with "Score care" -- do you see
25 that -- "will remain the same"?

1 A. Yes, I do see that.

2 Q. It says: "Score care will remain the same (green) as
3 long as we don't overspend." Is that a reference to the
4 scorecard? It's just a spelling error as far as understand?

5 MS. FERGUSON: Objection. Foundation.

6 THE COURT: Overruled.

7 A. I would -- I'm going to have to make an assumption that
8 I would assume he meant scorecard on that.

9 Q. And then the next paragraph says: "I want each of you
10 to be at the top of the scorecard by year's end."

11 Do you see that?

12 A. I do, yes.

13 Q. This is another reference by Mr. Jensen to various
14 individuals, including Mr. Jones, about performance on the
15 scorecard and the rankings.

16 A. Yes, it appears that way.

17 MR. LUCAS KASTER: Move for the admission of
18 Exhibit 142.

19 MS. FERGUSON: Objection.

20 THE COURT: Overruled. It's admitted.

21 MR. LUCAS KASTER: Then if we could go to Exhibit
22 146 and just show this to the witness, please.

23 BY MR. LUCAS KASTER:

24 Q. Mr. Shearer, there's two mails on this front page. The
25 bottom one appears to be one of those example emails that I

1 was showing you before where the scorecards are sent out on
2 a weekly basis with an updated scorecard.

3 Do you see that on the bottom for Ms. Smith?

4 A. Yes, I do.

5 Q. And then Mr. Jensen replies to Mr. Jones and a few other
6 recipients, right?

7 A. Yes.

8 Q. And then if we go to the sixth page of this exhibit in
9 an attachment -- it's kind of hard, because it's the wrong
10 direction, at least on my page it is, but this is another
11 example of the attachment of the updated scorecard metrics,
12 right?

13 A. It appears that way, yes.

14 MR. LUCAS KASTER: Move for the admission of
15 Exhibit 146.

16 MS. FERGUSON: Objection. Foundation.

17 THE COURT: I'll overrule it. We're getting
18 cumulative.

19 BY MR. LUCAS KASTER:

20 Q. Mr. Jensen says -- and I just have one question on this,
21 if we can go back to the first page.

22 Mr. Jensen's first line is: "Looking good. By
23 the end of the month you should all be in the top five."

24 Do you see that?

25 A. Yes, I do.

1 Q. You understand that end-of-the-year performance reviews,
2 the grades that managers receive on their end-of-the-year
3 performance reviews, also impacts to some degree the level
4 of their bonus under the Incentive Compensation Plan.

5 A. Yes, I do.

6 Q. Mr. Shearer, I think you testified that in your view
7 there was no reason for a manager to dissuade an employee
8 from reporting a defect at BNSF.

9 A. That's correct, yes.

10 Q. No reason to dissuade an employee from entering a slow
11 order.

12 A. That's correct, yes.

13 Q. Have you listened to the recordings in this case?

14 A. I have not, no.

15 Q. Do you know that Mr. Jones was swearing and yelling at
16 Mr. Sanders after he entered track defects and after he
17 entered slow orders?

18 A. No, I do not.

19 Q. Have you ever asked Mr. Jones, "Why did you do that?"

20 A. To my knowledge, I have not listened to the recording,
21 so I didn't know he was doing that. I have not asked any
22 questions on that.

23 MR. LUCAS KASTER: I have no further questions,
24 Mr. Shearer. Thank you.

25 THE COURT: Ms. Ferguson?

1 MS. FERGUSON: Just briefly.

2

3

REDIRECT EXAMINATION

4 BY MS. FERGUSON:

5 Q. Just following up on that last question, if a track
6 inspector doesn't report a track defect or a slow order,
7 BNSF has other means by which to find those defects and slow
8 orders, correct?

9 A. Yes, we do.

10 Q. And is that the reason there would be no incentive not
11 to report track defects?

12 A. Yes, it is.

13 Q. That coupled with potential catastrophic outcomes for
14 not reporting track defects or slow orders.

15 A. That is correct, yes.

16 Q. Thank you.

17 MS. FERGUSON: Nothing further.

18 THE COURT: Mr. Kaster, I assume nothing further.

19 MR. LUCAS KASTER: Nothing further, Your Honor.

20 Thank you.

21 THE COURT: Thank you. Mr. Shearer, you're
22 excused. Thank you, sir.

23 THE WITNESS: Thank you.

24 THE COURT: Ms. Ferguson, is BNSF prepared to call
25 its next witness?

1 MS. FERGUSON: Yes. I believe the next witness is
2 out in the hall.

3 (Pause - witness retrieved)

4 MS. FERGUSON: And the next witness is Stephanie
5 Detlefsen.

6 THE COURT: Good morning, Ms. Detlefsen. I'll
7 invite you to come up here and stand between the railing and
8 the witness seat, if you would, and I'll invite
9 Ms. Morton to administer the oath at this time.

10 THE CLERK: Please state your full name for the
11 record, spelling your first and last name.

12 THE WITNESS: Stephanie Marie Detlefsen. I'll
13 first spell the first name. S T E P H A N I E; Detlefsen is
14 D-E-T-L-E-F-S-E-N.

15 **STEPHANIE M. DETLEFSEN, DEFENDANT'S WITNESS, SWORN**

16 THE COURT: Thank you. Please be seated.

17 Ms. Donesky?

18 MS. DONESKY: Thank you, Your Honor.

19

20 **DIRECT EXAMINATION**

21 BY MS. DONESKY:

22 Q. Good morning, Ms. Detlefsen.

23 A. Good morning.

24 Q. Who do you currently work for?

25 A. BNSF Railway Company.

1 Q. And how long have you worked for BNSF?

2 A. Since 2002.

3 Q. So nearly 20 years?

4 A. That's right.

5 Q. What is your current position?

6 A. Director, Labor Relations, Employee Performance.

7 Q. And what department is this position in?

8 A. Labor relations.

9 Q. Is there any reporting relationship between labor
10 relations and the engineering department?

11 A. No.

12 Q. How long have you held your position, your current
13 position?

14 A. Since 2014.

15 Q. So you were in this position in 2016.

16 A. That's right.

17 Q. In your position, what are your primary duties and
18 responsibilities?

19 A. So what I do in my position is I help manage the
20 discipline policy for union employees, and specifically,
21 somebody on the team that I'm on will review any potential
22 dismissal before that discipline is issued.

23 Q. Where are you located in terms of your office?

24 A. Fort Worth, Texas.

25 Q. Do you have any direct reports?

1 A. No.

2 Q. Do you have any reporting relationship to Doug Jensen?

3 A. No.

4 Q. Any reporting relationship to Keith Jones?

5 A. No.

6 Q. Who do you report to?

7 A. I report to -- at the time or now?

8 Q. Oh, sorry. Yes, let's be clear. Those questions were
9 as of 2016, and who did you report to in 2016?

10 A. In 2016, I reported to Derek Cargill.

11 Q. What is PEPA?

12 A. So PEPA's an acronym. It just means Policy for Employee
13 Performance Accountability.

14 Q. And is there a policy that's entitled that?

15 A. That's right.

16 MS. DONESKY: Jan, if we could pull up Exhibit 10,
17 Defendant's 10.

18 Q. We'll look at this document here in a moment. If you
19 could describe, then, your role, there's reference I think
20 to a PEPA team. What is the PEPA team?

21 A. So the PEPA team is the team that I've described that
22 I'm a part of that helps ensure that our policy for our
23 union employees, discipline, is handled consistently
24 throughout the system, and we review potential dismissals
25 before the discipline is issued.

1 Q. Does the PEPA team review all discipline matters?

2 A. No.

3 Q. Which ones does it review?

4 A. Potential dismissals. We're there to help if somebody
5 has questions about lesser discipline, but we don't read
6 those cases.

7 Q. How long have you served on the PEPA team?

8 A. Since 2014.

9 Q. Seven years.

10 A. Yes.

11 Q. Looking then at the PEPA policy on your screen, which is
12 Exhibit 10, was this policy in effect in 2016?

13 A. Yes.

14 Q. What generally does this policy provide?

15 A. So it spells out the levels of discipline. They're
16 standard discipline, serious discipline, and then a section
17 called standalone dismissals.

18 MS. DONESKY: And, Jan, if you can go to 03, page
19 3.

20 Q. You just referred to three categories of discipline, one
21 being the standard violations you mentioned?

22 A. That's right.

23 Q. And that's on this first category.

24 MS. DONESKY: And then, Jan, if you could go to
25 04, the next page, and the second category, Series

1 Violations.

2 A. Yes.

3 Q. And then third is the standalone dismissible violations
4 that you referenced.

5 A. Right.

6 Q. Can you read that section of what that provides under
7 the Section 3?

8 A. "A non-exhaustive list of standalone dismissible
9 violations is provided in Appendix B. The violations
10 identified in Appendix B may result in immediate dismissal."

11 Q. Does every standalone dismissible violation always
12 result in dismissal?

13 A. No.

14 Q. And why is that?

15 A. Oh, there could be different reasons. The record itself
16 could have some sort of procedural flaw because we have to
17 follow collective bargaining agreements, or the record
18 itself just might not be strong enough to support a
19 dismissal ultimately, because it has to go to arbitration
20 later.

21 Q. That said, this category falls within those types of
22 violations that may result in immediate dismissal.

23 A. Yes.

24 Q. And when you say "immediate dismissal," does that mean
25 it doesn't progress through a progression? Is that the

1 distinction?

2 A. Yes. So standalone isn't part of a progressive
3 discipline policy. This category, the rule violations are
4 so egregious that even if you had been employed for 40 years
5 and had no discipline on your record, you could stand for
6 dismissal.

7 Q. And then it references an Appendix B.

8 MS. DONESKY: Jan, could you go to 06, please.
9 And if you could highlight the top part to one, the title
10 and -- thank you.

11 Q. Is one of the categories of potential standalone
12 dismissible violations theft, according to this?

13 A. Yes.

14 Q. "Or any fraudulent act which may be evidenced by the
15 intent to defraud BNSF or by the taking of BNSF monies or
16 property not due"?

17 A. That's right.

18 Q. Prior to the review that you conducted in 2016 -- now,
19 were you involved as a part of the PEPA team in reviewing
20 Mr. Sanders' hearings of investigation?

21 A. Prior to -- I got lost in your question.

22 Q. Sorry. Yeah. On the PEPA team, were you involved in
23 reviewing Mr. Sanders' investigative hearings?

24 A. Yes. I'm the one that reviewed the dismissals.

25 Q. Okay. And prior to that time, were you aware of or

1 familiar with Mr. Sanders?

2 A. No.

3 Q. Ever met him?

4 A. No.

5 Q. How did you first come to review the hearing transcripts
6 with respect to Mr. Sanders?

7 A. I just assigned them to myself. What we do when the
8 cases come in, it's a team, so you just try to balance the
9 workload. So his cases came up, I was available to do the
10 work, so I did.

11 Q. And would that case come to you typically by email?

12 A. It did back then, yes.

13 Q. Okay.

14 MS. DONESKY: Jan, if you can go to Exhibit 81,
15 please.

16 Q. Looking at Exhibit 81, does that reflect at the bottom
17 part --

18 MS. DONESKY: Jan, if you can highlight that
19 middle part, please. Thank you.

20 Q. Is this how the first hearing investigation came to your
21 attention relating to Mr. Sanders?

22 A. Yes.

23 Q. And so it goes -- is it an email then? Does the PEPA
24 team have its own email?

25 A. That's right. The PEPA email account is a shared inbox,

1 so at the time emails would just come in and you would just
2 assign them to yourself.

3 Q. How many were on the team at the time?

4 A. Three people.

5 Q. And then did you receive an additional email from
6 Mr. Jones with respect to Mr. Sanders?

7 A. Yes.

8 MS. DONESKY: Jan, if we can go to Exhibit -- I
9 think it's 83 -- 82, please. Sorry. My D-82 looks
10 different. Then if you can highlight the middle part,
11 please.

12 Q. Would this reflect a second email you received from
13 Mr. Jones then?

14 A. Yes.

15 Q. And what is typically attached then with the email?

16 A. Just the investigation transcript and exhibits and the
17 employee's transcript.

18 Q. And upon receiving each of these emails, what did you do
19 next?

20 A. I reviewed the record, reviewed Mr. Sanders' employee
21 transcript to see if he had any active discipline, read the
22 investigation transcript testimony and then reviewed the
23 exhibits.

24 Q. And what, if any, weight would you give to or did you
25 give to Mr. Jones' summary that he provided in these emails?

1 A. None.

2 Q. And why is that?

3 A. Because I do my own independent review.

4 Q. And then looking at after you conducted the
5 investigative hearings, you got two emails with two
6 different transcripts, right, two different hearings?

7 A. That's right.

8 Q. Is that unusual to receive for one employee hearing
9 transcripts more than one at one time?

10 A. No.

11 Q. So that's happened before?

12 A. Yes.

13 Q. And once you review those, then what did you do next?

14 A. I reached out to the law department and human resources.

15 Q. Why did you do that here?

16 A. Mr. Sanders and his local chairman alleged retaliation,
17 and anytime there's an allegation like that I involve the
18 law department, and in this particular case he said HR
19 complaints, so I looped in HR as well.

20 MS. DONESKY: Jan, if you could pull up Exhibit
21 83, please, middle of the page, please.

22 Q. Ms. Detlefsen, does this reflect the email that you
23 would have sent to human resources to request their review
24 of the matter concerning Mr. Sanders?

25 A. Yes.

1 Q. And then do you also conduct any kind of -- do you
2 prepare any kind of summary or report after you reviewed the
3 investigative hearing?

4 A. After I've reviewed the record, if I support dismissal,
5 then I will write a synopsis.

6 Q. With respect to --

7 MS. DONESKY: Oh, if you can stay on 83.

8 Q. With respect to the review from HR, what response did
9 you receive back from human resources?

10 A. Do you want me to read it or?

11 Q. Yes, please.

12 A. So Terry Morgan responded:

13 "Thank you for asking. Regional HR Director Dane
14 Freshour and I are very familiar with Mr. Sanders'
15 allegations of harassment and retaliation. There is no
16 evidence to substantiate his allegations. Please consider
17 this case on the merits of the facts and evidence brought
18 forth during the formal."

19 Q. When he writes to "please consider the case on the
20 merits of the facts and evidence brought forth during the
21 formal," what did you understand that to mean?

22 A. He meant just read the investigation for what it is,
23 that there was no indication that it was evidence of
24 retaliation of any kind, and so just read for the rule
25 violations itself.

1 Q. And did you do so?

2 A. Yes.

3 MS. DONESKY: Looking at, then, Exhibit 84, Jan,
4 if you could pull that up.

5 Q. You referenced that you prepare a report upon reading of
6 the transcript. Does this Exhibit 84 reflect the synopsis
7 that you prepared in Mr. Sanders' separate investigations?

8 A. Yes.

9 Q. Why don't we walk through this document, then.

10 MS. DONESKY: If you can just start with the top
11 half, Jan, please.

12 Q. You have two backgrounds, then, separated out. What is
13 your purpose there of doing that?

14 A. All right. So this part I don't actually write. This
15 is auto-populated from our EPTS systems so we might go in
16 there and just change if there was grammar or something
17 incorrect, but I didn't write the background one and two.
18 The information that I input starts down below.

19 Q. Okay. With respect to --

20 MS. DONESKY: Jan, if you can just --

21 Q. Is the policy justification something you populate?

22 A. The policy justification is, yeah. It's only the
23 background that I don't write. That's just the
24 investigation notice language and it notes who the
25 investigating officer was and then who the discipline

1 officer was.

2 MS. DONESKY: So, Jan, if you can highlight the
3 hire date, discipline, policy justification section, please.

4 Q. Can you explain this section, then?

5 A. Right. So the hire date is simply when Mr. Sanders was
6 employed. The discipline shows any active discipline.

7 There could be more discipline on his record, but if it was
8 not active, then I would not list it there. And in this
9 case that standard discipline didn't have anything to do
10 with the justification to dismiss because that was a
11 standalone. Both of them were standalone dismissible
12 events.

13 Q. And are they each separate and apart, each standalone
14 dismissals separate and apart from each other?

15 A. Yes.

16 Q. So let's focus on the first hearing, then, that you
17 reviewed. What was ultimately upon your review the basis
18 for your decision? What did you ultimately decide with
19 respect to the hearing in terms of the rule violations?

20 A. That they had clearly been proven.

21 Q. And why did you conclude that?

22 A. The testimony and the exhibits, the totality of the
23 record, was convincing that Mr. Sanders did dishonestly
24 claim time for pay -- claim time -- claim pay for time not
25 worked.

1 Q. Were there -- there was some arguments made at the
2 hearing with respect to the fact that payroll had not
3 closed. What, if any, weight did that have on your review?

4 A. None.

5 Q. And why is that?

6 A. Well, one of the main reasons is his local chairman said
7 we wouldn't have changed anything anyway, so I didn't really
8 understand that argument that he said throughout the hearing
9 this isn't fair, you know, payroll hasn't closed yet, but
10 then he would say in the next sentence: But we wouldn't
11 change any time anyway, because we don't think anything is
12 wrong here.

13 But the second reason is, I see that defense a
14 lot, that payroll hasn't closed; therefore I'm not guilty of
15 stealing, and to me that's not persuasive, because as long
16 as the intent to steal was there, then I'm glad that you,
17 you know, didn't get paid money that you weren't due, but
18 that doesn't mean that you didn't try to steal it.

19 Q. There was also an argument in the first hearing that
20 Mr. Sanders argued that he went to Bridal Veil during part
21 of that day. What, if any, weight did that argument have on
22 your review.

23 A. None.

24 Q. And why not?

25 A. Because that was another argument that didn't make

1 sense. He brought in his own GPS records to show us, hey, I
2 was working that day, you've got it all wrong, but his own
3 GPS records never put him at Bridal Veil.

4 So there was a lot in the record, it wasn't just
5 that, but that was one of the things that was pretty
6 persuasive.

7 Q. In the first hearing as well as the second hearing, it
8 reflected that the supervisor had observed Mr. Sanders --
9 call it surveillance or reviewing him from afar.

10 Do you encounter in your review as part of the
11 PEPA team, are there other instances where surveillance
12 occurs?

13 A. Yes.

14 Q. Moving on, then, to the second hearing that you
15 reviewed, what conclusion did you draw upon reviewing the
16 record with respect to the second hearing?

17 A. That Mr. Sanders again falsified his time.

18 Q. And upon what basis did you reach that conclusion?

19 A. Well, this one he actually said that he did. He just
20 said that he was going to go back in later and change it,
21 but even when he do go back later and change it, he didn't
22 accurately claim his time.

23 Q. There were also arguments made in that case with respect
24 to payroll hadn't closed, other types of arguments. Were
25 any of those given any weight by you in your review?

1 A. No. Again, payroll not closing doesn't mean -- like,
2 you're not supposed to falsify time and then go back in
3 later and change it if you get caught. Like, payroll
4 closing is more for: Oh, gosh. I forgot. I'm due a
5 penalty claim for something and I need go back in there and
6 put that. Or: Oh, gosh. I forgot I need to claim holiday
7 pay, or overtime, or whatever. But it doesn't mean that you
8 put in false time with a notion of going back later and
9 changing it. Because as Mr. Sanders even said in that
10 investigation when he went to do that, he couldn't remember
11 what times were right anyway.

12 MS. DONESKY: If we can go to the second page,
13 Jan.

14 Q. At the bottom of your synopsis -- Jan, at the very
15 bottom, the last portion, please, thank you -- there's
16 something there that references -- called "Arbitration
17 Estimates." What is that?

18 A. So it's a risk assessment for arbitration. Once we
19 discipline an employee, the relationship employee/employer
20 isn't over yet. It has to go through arbitration. So
21 there's stages of appeal, and if the company declines the
22 union's appeals, it ultimately goes to a third-party
23 neutral. So this is my assessment.

24 We would never give it a zero percent chance,
25 because you never know what's going to happen at

1 arbitration. So five percent is the lowest rating I could
2 give it. So the "R" means I think there's a five percent
3 chance that he would be reinstated.

4 And the "B" is back pay. So again, the lowest
5 rating I could give it was -- this is me saying I don't
6 think he's going to be reinstated and I don't think there
7 would be any back pay if he were reinstated.

8 Q. And then going to the last page of your review, then, or
9 the document.

10 MS. DONESKY: If you can, Jan. Thank you.

11 Q. Ultimately, then, was a determination made for -- what
12 level of discipline was determined?

13 A. Dismissal.

14 Q. And was it under the policy -- under what level was it
15 under the categories?

16 A. Both of his dismissals were standalone.

17 Q. And according to that review, it looks like also the
18 general manager, Chad Sundem, also reviewed the matter?

19 A. Yeah. After I write my synopsis, we'll send the records
20 out to the employee's chain of leadership and have their
21 general manager or EVP write some comments.

22 Q. So that additional review was conducted as well.

23 A. That's right.

24 Q. And the synopsis we just we want through and that you
25 prepared, was that done contemporaneous with your review of

1 the hearing transcripts?

2 A. Yes.

3 Q. Are you familiar, Ms. Detlefsen, with other instances of
4 maintenance of way employee dismissals in the Twin Cities
5 division over the last five years?

6 A. Yes.

7 Q. Looking at Exhibit 93.

8 MS. DONESKY: Jan, please. Thank you. Defendant.

9 THE COURT: Is there an objection to 93?

10 MR. LUCAS KASTER: No objection, Your Honor.

11 THE COURT: All right. It's admitted. It may be
12 published.

13 BY MS. DONESKY:

14 Q. If we could blow up the first half, please.

15 Can you describe what this document is and how it
16 came about, or the -- is this one of your reviews for PEPA?

17 A. Yes, I reviewed this case.

18 Q. And so you're familiar with the circumstances. Can you
19 please describe generally what was involved in this matter.

20 A. So this employee had been talked to before about
21 accurately recording his time, so when he asked for time off
22 for a dentist appointment, his supervisor said okay, but
23 then he decided to follow up and make sure that the employee
24 was actually just going to the dentist. And what he learned
25 by observing the vehicle was that it didn't move. It was

1 parked at his house, I think it was, yeah, his residence for
2 four days, then the employee claimed that he had actually
3 worked.

4 Q. And the references of the four days are listed there and
5 the amounts of time not worked?

6 A. That's right.

7 Q. And surveillance was conducted in that situation?

8 A. Yes.

9 Q. And what ultimately did you conclude upon review of the
10 hearing record in this situation?

11 A. That the rule violations were proven and that he stood
12 for dismissal.

13 MS. DONESKY: If you blow up that middle paragraph
14 there, Jan, where the cursor is.

15 Q. It appears from this hearing that this individual also
16 claimed to have inputted his hours incorrectly, but planned
17 to correct them at a later date?

18 A. That's right.

19 Q. And what weight, if any, did give to the argument?

20 A. None.

21 Q. And why is that?

22 A. Because again, the intent that you're able to edit your
23 time is predicated on the notion that you're being honest
24 when you're putting it in to begin with. It isn't for you
25 to put in false times and then go back later and change.

1 MS. DONESKY: And if we can go to the next
2 paragraph underneath that, Jan, please. Thank you.

3 Q. Looking at this paragraph that you prepared, it looks
4 like the additional defense was that he had also, according
5 to his local chairman, entered into evidence screenshots of
6 unofficially amended records that this individual worked up
7 on the eve of the investigation, and what was your
8 conclusion with respect to that defense?

9 A. That it didn't matter, that he was trying to change it
10 after the fact, that he knew when he put it in that it was
11 false.

12 Q. And it looks like also in the summary here that this
13 individual was removed from service pending investigation?

14 A. That's right.

15 MS. DONESKY: In the last paragraph, Jan, if you
16 could highlight, please.

17 Q. Were there arguments made in this hearing as well that
18 the individual claimed that the supervisor was out to get
19 him?

20 A. Yes.

21 Q. And then you reached your conclusions with respect to
22 that argument and rejected it?

23 A. That's right.

24 Q. And ultimately you said dismissal was your -- you
25 supported dismissal.

1 A. Yes.

2 MS. DONESKY: Then moving on to the next page,
3 please, 02. One more, please.

4 Q. Are you familiar with the circumstances with respect to
5 employee CM?

6 A. Yes.

7 Q. Can you describe for the jury what the circumstances
8 were there.

9 A. So he is a bridges and buildings foreman, and over the
10 course of three days his supervisor did surveillance on him
11 and again saw that he was falsifying his payroll by claiming
12 overtime that he didn't actually work.

13 Q. And referenced in the summary are the dates on which the
14 surveillance was conducted, times were recorded, and
15 ultimately the discrepancies were noted.

16 A. That's right.

17 Q. And upon your review of the record, what were your
18 conclusions?

19 A. That the rule violations were proven and I supported
20 dismissal.

21 Q. And was that supported as a standalone dismissal?

22 A. Yes.

23 Q. And then if we can move on to 05, are you familiar with
24 circumstance of a dismissal with an employee with initials
25 of JT?

1 A. Yes.

2 Q. What were the circumstances with respect to this
3 individual?

4 A. So this one was a case about dishonesty. He was signal
5 maintainer and said that he had done a 90-day test when all
6 the records show that he had not.

7 Q. And upon review of the record, what did you conclude
8 there?

9 A. The rule violations were proven and I supported
10 dismissal.

11 Q. And was that too as a standalone dismissal?

12 A. Yes.

13 Q. And then moving on to the 07, the circumstances here
14 with respect to RM, what were the circumstances relating to
15 this hearing?

16 A. So this one I didn't actually review, but the
17 circumstances were that he was on a surfacing crew and
18 reported that he had left at the end of his shift and his
19 supervisor had noted that he hadn't worked for hours. So he
20 left early and didn't have permission to do so and claimed
21 that he'd worked the entire time.

22 Q. And upon review of the record, what did you conclude --
23 or what did the PEPA team conclude then?

24 A. The employee was dismissed.

25 MS. DONESKY: And then the last one in 09, Jan,

1 page 9.

2 Q. What were the circumstances with respect to the
3 dismissal of SR?

4 A. Okay. This one wasn't one of mine either, but SR was
5 actually not a union employee. He was what we call an
6 officer of the company or exempt. It's like what I am.
7 You're at-will. But he had craft seniority. So when he
8 lost his exempt status for falsifying his expense reports,
9 he wanted to exercise his craft seniority, so then they had
10 to have an investigation to dismiss him altogether from the
11 company.

12 Q. And ultimately, what was the conclusion reached then?

13 A. That dismissal was supported.

14 Q. Going back, then, just a last question for you.

15 MS. DONESKY: Jan, if you could go back to
16 eighty -- we'll start with 81, please.

17 Q. Just returning briefly to Mr. Sanders' situation, in
18 closing out the loop in your correspondence on that, if you
19 can look at the top half there.

20 MS. DONESKY: And, Jan, highlight that, please.
21 Thank you.

22 Q. Once you've completed your review and reach your
23 conclusion, what do you -- then how do you finish out your
24 review?

25 A. So I send back my recommendation to the field, either

1 explaining that I support dismissal or that I don't support
2 dismissal or, like in this case, I support dismissal, but
3 not for every charge that you might have thought.

4 Q. And in this circumstance you reference that you have
5 read the record and you've consulted with HR and the law
6 department, correct?

7 A. That's right.

8 Q. And you support dismissal on a standalone basis for
9 dishonesty/theft of time.

10 A. Yes.

11 Q. And you indicate that the rule violations were proven.

12 A. Right.

13 Q. And then the last part you mention just what the
14 charge -- is that what you're explaining there, the last
15 part?

16 A. That's right. Some people -- insubordination wasn't
17 even one of the charges, so we couldn't discipline an
18 employee for something that we didn't charge him with.

19 Q. That's what you were explaining there.

20 A. Yes.

21 Q. And the date of your concluding review is what?

22 A. The date --

23 Q. Yes.

24 A. -- is April 27th, 2016.

25 Q. And then looking at Exhibit 82 then.

1 MS. DONESKY: First half of it again, please.

2 Q. Now, just to be clear, on the email we just looked at,
3 was that to the investigative hearing, the first one?

4 A. Yes.

5 Q. And then this is to the second one, correct?

6 A. Right.

7 Q. Okay. And what did you write to Mr. Jones?

8 A. "Keith, I have read the record and have consulted with
9 HR and the law department. I support dismissal on a
10 standalone basis for dishonesty/theft of time. The rule
11 violations were proven."

12 Q. And the date of that email was?

13 A. April 27th, 2016.

14 MS. DONESKY: I have nothing further at this time.

15 THE COURT: We'll take a break, Mr. Kaster, at
16 this point. I think it makes some sense. We will break at
17 this point and we will resume at roughly between 11:05 and
18 11:10. We'll pick up there.

19 All right. We're adjourned.

20 (Recess taken at 10:50 a.m.)

21 * * * *

22 (11:10 a.m.)

23 IN OPEN COURT

24 (Jury enters)

25 THE COURT: Please be seated.

1 Ms. Detlefsen, you can return to the witness
2 stand, please.

3 THE WITNESS: (Complies).

4 THE COURT: Mr. Kaster?

5 MR. LUCAS KASTER: Thank you, Your Honor.

6

7

CROSS-EXAMINATION

8 BY MR. LUCAS KASTER:

9 Q. Ms. Detlefsen -- is that how you pronounce your name?

10 A. Detlefsen.

11 Q. My name's Lucas Kaster. I'm one of the attorneys who's
12 representing Mr. Sanders. I'm going to ask you a few
13 questions, okay?

14 A. Okay.

15 Q. The administrative hearings that you were referencing
16 with Counsel, do the Rules of Evidence apply in those
17 hearings?

18 A. The administrative hearing. You're talking about our
19 disciplinary process?

20 Q. Correct.

21 A. And you're asking what applies?

22 Q. The Rules of Evidence.

23 A. I don't know what you mean by the Rules of Evidence.
24 The Collective Bargaining Agreement applies.

25 Q. What about the Rules of Civil Procedure?

1 A. No, I don't think so. It's not a legal proceeding.

2 It's an internal company --

3 Q. And the person who's overseeing the proceeding is a BNSF
4 manager.

5 A. Yes.

6 Q. And you reference various objections that were brought
7 up during the hearing by Mr. Sanders and his union
8 representative, right?

9 A. Yes.

10 Q. Are those objections ruled on in any way, shape, or form
11 during the hearing?

12 A. No. Again, this isn't a legal proceeding, so we're not
13 lawyers. We're just complying with the Collective
14 Bargaining Agreement to have this disciplinary process so
15 the employee can come and give us their side of the story.
16 If we think that there are rules that could have been
17 violated, the employee has a chance to explain it. So they
18 have a union representative and -- I'm sorry. I forgot your
19 question now.

20 Q. Sure. I was asking you about the objections that were
21 made.

22 A. Oh. So ruled on? If it's something that can be
23 addressed, like: I think we should cancel this
24 investigation because the time limits have been blown or
25 something like that, then they would address that, but if

1 it's just sort of an ongoing objection that can just be
2 noted for the record, that's usually what the conducting
3 officer says, is, "Your objection's noted" and then they
4 just move on.

5 Q. For example, Mr. Sanders and his union representative
6 raised during the hearings that they believed the charges
7 were retaliation.

8 A. Right, that was one of their defenses, yes.

9 Q. Did anybody make a determined as part of that hearing
10 process whether those allegations by Mr. Sanders and his
11 union rep had any validity?

12 A. Well, they raised that as a defense and then I took it
13 upon myself when I reviewed the record to escalate it to the
14 law department and the HR department because of those
15 allegations.

16 Q. And the extent of your review is that email that we
17 looked at.

18 A. That was the result of my review, not the extent of my
19 review.

20 Q. Did you do something else to determine whether Mr.
21 Sanders' allegations of retaliation had any merit?

22 A. No. Like I said, I reached out to the law department
23 and the human resources department.

24 Q. And they emailed you back saying there's no evidence to
25 support that.

1 A. They said that there was no evidence that Mr. Sanders
2 had been singled out or retaliated against and that I should
3 just review the record for its merits.

4 Q. And that was the extent of what you did?

5 A. Right. I reviewed the exhibits and there was a letter
6 in there in which the human resources department responded
7 to Mr. Sanders and said that his allegations against his
8 supervisor's communication style or something about his
9 communication had been had substantiated and that they had
10 rectified that situation, but that they found no evidence to
11 support that he was being singled out or retaliated against.

12 Q. This PEPA department, it's a department within BNSF,
13 right?

14 A. I wouldn't really call it a department. It's just a
15 team in labor relations.

16 Q. But all of the PEPA team is employed by BNSF.

17 A. Yes.

18 Q. Internal employees.

19 A. That's right.

20 Q. If we could go to Exhibit 169, please.

21 Ms. Detlefsen, this is Plaintiff's version of your
22 written-up summary from Mr. Sanders' cases.

23 A. This is what?

24 Q. Your written-up summary?

25 A. Yes.

1 Q. It's just a different exhibit number.

2 A. Okay.

3 Q. It's our marked exhibit as opposed to Defendant's. And
4 if we could blow up the in the middle of the page, there's a
5 paragraph that starts with "Synopsis 1" in bold.

6 This is what you wrote, right, this synopsis is
7 your writing?

8 A. That's right.

9 Q. And you write in your synopsis:

10 "Although not well-developed on the record, his
11 supervisor had talked to Mr. Sanders many times about
12 working the hours of his shift and correctly accounting for
13 his time."

14 Where in the record did it say that?

15 A. Like I said, it wasn't really well-developed. There's
16 something at the beginning of the first investigation about
17 how his supervisor noticed on the 18th that he had left
18 early, so she decided to conduct surveillance on the 19th.
19 I don't know on the record where it was discussed about --
20 that they had had previous discussions.

21 Q. So you can't point to us any part of the transcript that
22 supports your summary that Mr. Sanders had been spoken to
23 many times before the allegations.

24 A. No. It was not well-developed.

25 Q. And you just testified that Ms. Hoppenrath determined

1 the day before on March 18th.

2 A. That's how I remember it, that she saw on the 18th that
3 he had left early, so she decided to watch what he did on
4 the 19th.

5 Q. Do you know how far early Mr. Sanders allegedly left?

6 A. No.

7 Q. Do you know Ms. Hoppenrath has testified in this case it
8 was approximately 15 minutes?

9 A. Like I said, I didn't know.

10 Q. Do you think that justifies surveilling an employee for
11 three separate days?

12 A. I don't know what led up to Mr. Sanders being
13 surveilled.

14 Q. Your decision was based solely upon the transcripts and
15 the exhibits, right?

16 A. That's right.

17 Q. And I believe you testified before that any prior
18 discipline that Mr. Sanders had didn't factor into your
19 determination.

20 A. That's right.

21 Q. And at the time you made the determination, you knew
22 that Mr. Sanders had filed complaints with HR.

23 A. Yes.

24 Q. About Mr. Jones and Ms. Hoppenrath.

25 A. Whatever was on the record I read, that he had

1 complained about his supervisors.

2 Q. The same two people who are now alleging that he engaged
3 in payroll theft.

4 A. Yes.

5 Q. Did that raise any concerns for you?

6 A. No.

7 Q. You believed, I think you said, that the evidence was
8 overwhelming, something to that effect.

9 A. Yes. I think I said clearly proven or something, yes.

10 Q. We've seen evidence in this case that Ms. Hoppenrath
11 testified that on March 19th, the first day, that
12 Ms. Hoppenrath testified that Mr. Sanders got back to the
13 Dayton's Bluff shack at 1:15 p.m.

14 Do you recall that?

15 A. That sounds about right.

16 Q. Do you know BNSF's own demonstrates that Mr. Sanders was
17 driving the company vehicle until 1:48?

18 A. No, I don't remember the exact times.

19 Q. You never looked at that.

20 A. I looked at everything. I just -- as I'm sitting here,
21 I don't remember the exact times that you're saying.

22 Q. Do you think that that's important when you're making a
23 determination about somebody's job whether the evidence the
24 company is putting forward actually makes sense.

25 A. Yes.

1 Q. And despite the fact that Ms. Hoppenrath's testimony
2 about when Mr. Sanders got back conflicts with its own
3 records, you thought the evidence was -- what did you say?

4 A. I thought that the -- a case was clearly proven.

5 Q. You also referenced something about time entry and how
6 Mr. Sanders and his union representative indicated that
7 Mr. Sanders had put in time as a placeholder, right?

8 A. Mr. Sanders said that he put in time with the intent to
9 go back later and change it?

10 Q. Yes.

11 A. Yes.

12 Q. Did you talk to any other employees in the Twin Cities
13 division to determine whether that was a common practice?

14 A. No.

15 Q. You also referenced the fact of -- you said something
16 about the fact that Mr. Sanders simply because he hadn't
17 gotten paid yet, that doesn't mean his hours weren't
18 inaccurate or shouldn't matter.

19 A. Right.

20 Q. Do you know that BNSF actually paid Mr. Sanders then for
21 the hours that he reported?

22 A. I don't understand your point.

23 Q. The hours that BNSF contends were false were actually
24 paid to Mr. Sanders. Do you know that?

25 A. I did not know that. It doesn't change my opinion.

1 Q. Are you contending that BNSF always terminates employees
2 for alleged dishonesty or payroll issues?

3 A. No.

4 Q. At the time you made the decision for Mr. Sanders, did
5 you look at any comparators to determine whether BNSF made
6 similar decisions in other cases?

7 A. No.

8 Q. Did you ask Mr. Jones whether he's dismissed any other
9 employees for similar-type violations?

10 A. No. My job is to ensure consistent application of the
11 policy, and in this case the charges were proven, so as part
12 of consistently applying that policy, I supported dismissal.

13 Q. How do you determine consistent application of policy if
14 you don't look at how it's been applied in other
15 circumstances?

16 A. I do know how it's been applied in other circumstances
17 because that's my job. I do it every day.

18 MR. LUCAS KASTER: If we can bring up Exhibit 218,
19 please. I'm sorry. Before we go there, Karla, could we go
20 back to Defendant Exhibit 93.

21 Q. Ms. Detlefsen, before I move on, I just want to ask you
22 a few questions about this exhibit.

23 This first synopsis -- or let me ask you generally
24 before I get into the specifics.

25 None of these individuals listed here were

1 supervised by Mr. Jones, right?

2 A. Right.

3 Q. None of them were supervised by Ms. Hoppenrath.

4 A. I don't know who they were supervised by.

5 Q. Looking at this first summary -- and if we could blow up
6 the paragraph in the middle of the page that starts with
7 "During the investigation."

8 And I think you said -- when you were summarizing
9 this synopsis, you said something about the fact that the
10 employee had been talked to before about time entries.

11 Do you recall that?

12 A. Well, it's blown up now kind of blocking it, so if
13 that's what I says, then that's what I said.

14 Q. Do you know that Mr. Sanders wasn't talked to about how
15 he was reporting time?

16 A. It was my understanding he had been, but I don't know.

17 Q. Based upon?

18 A. I don't recall.

19 Q. In this summary you reference that the person in
20 response to the allegations claimed that they were
21 distraught because they had witnessed a recent crossing
22 accident or fatality, right?

23 A. That's right.

24 Q. Have you ever witnessed a railroad fatality?

25 A. No.

1 Q. Would you agree with me that witnessing someone being
2 killed on the railroad would be a traumatic incident?

3 A. Absolutely.

4 Q. And BNSF's response to the claim of trauma by an
5 employee who witnessed somebody being killed was to accuse
6 them of theft and fire them?

7 A. No.

8 Q. If we could go to page 3 of this exhibit. This is a
9 synopsis where the supervisor admitted to surveil the
10 employee, right?

11 A. That's right.

12 Q. Taking pictures of them, right?

13 A. Yes.

14 Q. Let's go to page 7 of this exhibit.

15 This is an incident where a manager placed a
16 quarter on one of the vehicle's tires that the employee was
17 supposed to use --

18 A. That's right.

19 Q. -- to determine whether it had been moved or not.

20 A. Yes.

21 Q. In your experience, is that something you commonly see
22 is managers surveilling employees under their direction?

23 A. I would say I've seen it before.

24 Q. BNSF's okay with that.

25 A. Yes.

1 Q. If we could go to Exhibit 218, please.

2 Ms. Detlefsen, Exhibit 218 is a charge letter to a
3 Mr. Kramer. Do you see that?

4 A. Yes.

5 Q. This is a standard form that's sent out to an employee
6 when they're accused of some type of violation.

7 A. That's right.

8 Q. And it tells them what the nature of the violation is
9 and on what approximate date or time.

10 A. Right.

11 Q. This person was accused to have been lying about track
12 and time, right?

13 A. That's what it says.

14 Q. The manager who issued the letter was Keith Jones,
15 right?

16 A. Yes.

17 Q. If we can go to the second page, this person was offered
18 a waiver, right?

19 A. Yes.

20 Q. And a waiver means you're not terminated, you're
21 accepting responsibility, you can continue to be employed.

22 A. That's right.

23 Q. Do you know if Mr. Sanders was ever offered a waiver?

24 A. I don't know that.

25 Q. If we go to Exhibit 222, please.

1 Another notice of investigation to an individual
2 Mr. Klukas. Do you see that?

3 A. Yes.

4 Q. "Alleged theft of time when you allegedly falsified your
5 falsely your payroll beginning on August 2nd, 2016 and
6 continuing while working as a truck driver."

7 Do you see that?

8 A. Yes.

9 Q. So theft of time, falsifying payroll, on multiple days.

10 A. Yes.

11 Q. Issued by Keith Jones.

12 A. Yes.

13 Q. If we go to the next page, this individual received a
14 waiver and was given a 36-day suspension, right?

15 A. 36-day actual suspension, yes.

16 Q. Not terminated.

17 A. No.

18 Q. If we go to Exhibit 223, Mr. Johnson alleged to have
19 entered unapproved overtime on multiple days, right?

20 A. Right.

21 Q. Issued by Mr. Jones.

22 A. Yes.

23 Q. If we go to the second page, the person was given a
24 waiver, right?

25 A. That's right.

1 Q. And given a one-year review period.

2 A. Yes.

3 Q. Did you review any of these documents to determine how
4 Mr. Jones had handled these types of violations before?

5 A. No.

6 Q. If we go to Exhibit 217.

7 MR. LUCAS KASTER: And I don't believe this is in
8 evidence, so I'm going to show it to the witness.

9 Q. Ms. Detlefsen, this is a notice of a level S actual
10 suspension to a Mr. Metzinger, M-E-T-Z-I-N-G-E-R. Do you
11 see that?

12 A. Yes.

13 Q. June 15th, 2015 was the date of the investigation,
14 right. Yes?

15 Q. Allegation: Falsification of time.

16 A. Yes.

17 Q. This person was not terminated, right?

18 A. Right.

19 Q. This is a record maintained in the regular course of
20 BNSF's business?

21 A. Yes.

22 MR. LUCAS KASTER: Move for the admission of
23 Exhibit 217.

24 MS. DONESKY: Relevance objections.

25 THE COURT: Overruled.

1 BY MR. LUCAS KASTER:

2 Q. If we go to Exhibit 219, please.

3 Another issuance of a notice to an employee on
4 February 8, 2016. Do you see that?

5 A. Yes.

6 Q. "Failure to comply with instructions and unauthorized
7 overtime" on two separate days, right?

8 A. Right.

9 Q. This person was offered a waiver, right?

10 A. I don't know.

11 Q. This is a document maintained in the regular course of
12 business by BNSF?

13 A. This investigation charge letter? Yes.

14 MR. LUCAS KASTER: Move for the admission of
15 Exhibit 219.

16 MS. DONESKY: Relevance objection.

17 THE COURT: Sustained.

18 BY MR. LUCAS KASTER:

19 Q. If we could go to Exhibit 220. Sorry. If we can go
20 back to Exhibit 219, please. Sorry. I skipped over this
21 part.

22 If we go to the second page, this is the waiver
23 form that's actually signed by the employee, right?

24 A. Right. Now I can agree that there's a waiver.

25 Q. So this person was offered a waiver, agreed to it.

1 A. Yes.

2 Q. Wasn't terminated.

3 A. Right.

4 MR. LUCAS KASTER: Move for the admission of
5 Exhibit 219.

6 MS. DONESKY: Same objections.

7 THE COURT: Sustained.

8 BY MR. LUCAS KASTER:

9 Q. Go to Exhibit 220.

10 This is a notice of an investigation "for failure
11 to comply with instructions, failure to input payroll and
12 production reports accurately."

13 Do you see that?

14 A. And on time, yes, I see that.

15 Q. The notice is dated August 17th, 2016?

16 A. Yes.

17 Q. There's a cc person Doug Jensen. Do you see that on the
18 bottom?

19 A. I see it.

20 Q. Second page is a waiver where the person signed off and
21 remained employed.

22 A. Yes.

23 MR. LUCAS KASTER: Move for the admission of
24 Exhibit 220.

25 MS. DONESKY: Relevance objection.

1 THE COURT: Sustained, and 403.

2 BY MR. LUCAS KASTER:

3 Q. Exhibit 221, please.

4 Notice dated September 28th of 2016 for a
5 Mr. Knutson. Do you see that?

6 A. Yes.

7 Q. Allegation of "falsifying your payroll." Do you see
8 that?

9 A. Yes, mm-hm.

10 Q. Is that a yes?

11 A. Yes.

12 Q. Go to the second page. The person was offered a waiver,
13 right?

14 A. Yes, the employee got a waiver.

15 Q. And you see on the third page there's a signature where
16 the person accepted the waiver?

17 A. Yes.

18 Q. Not terminated.

19 A. Right.

20 MR. LUCAS KASTER: Move for the admission of
21 Exhibit 221.

22 MS. DONESKY: Relevance objection.

23 THE COURT: Overruled.

24

25 BY MR. LUCAS KASTER:

1 Q. Ms. Detlefsen, we've looked at your synopsis and all of
2 these records that we just went over where employees are
3 accused of violations on multiple days and not a single one
4 went through two separate investigations, right?

5 A. I don't know.

6 Q. But Mr. Sanders went through two separate
7 investigations.

8 A. Yes.

9 Q. And you believe he should be terminated, you know,
10 solely, separately, for each of those allegations.

11 A. That's right.

12 Q. Even though all of these other employees had similar
13 allegations on multiple days and weren't terminated.

14 A. Right.

15 Q. Ms. Detlefsen, did you listen to the recordings in this
16 case?

17 A. I don't remember listening to any recordings.

18 Q. Do you know the recordings show Mr. Jones, the same
19 person who charged Mr. Sanders with these violations,
20 swearing at him, yelling at him, threatening him for doing
21 his job?

22 A. No.

23 MR. LUCAS KASTER: I have no further questions.

24 THE COURT: Ms. Donesky?

25 MS. DONESKY: Thank you. Just briefly.

REDIRECT EXAMINATION

BY MS. DONESKY:

Q. In your experience, Ms. Detlefsen, are there times when a waiver may be agreed upon between the parties either during a hearing or post-hearing of the investigation?

A. Yes.

Q. Why might that be?

A. Well, if it's after the hearing, it's usually because there was something wrong with the record, so either there was a fatal flaw, which means it wouldn't go past arbitration because of some sort of procedural error, like time limits, or sometimes there's an exchange of exhibits that's supposed to happen 48 hours ahead of time, and if that step wasn't taken, then that could be a fatal flaw, so there could be procedural errors with the record.

Or it could just be sort of a weak record.

Generally speaking, our company witness might not have done a good job testifying about the rule violations or how the behavior was connected, or maybe the employee himself gave plausible reasons that could maybe explain away things. So just generally the weakness of the record.

Q. And is that part of -- as you're reviewing the record, you conduct that risk assessment analysis that we looked at at the bottom of your synopsis?

1 A. Yes.

2 Q. And Counsel mentioned recordings at the very end of his
3 questioning of you and you did not review those, correct?

4 A. No.

5 Q. In fact, you did not review anything outside of the
6 hearing record, exhibits, and the employee transcript,
7 correct?

8 A. Right.

9 Q. And that's exactly why you conduct an independent review
10 of that record.

11 A. That's right.

12 MS. DONESKY: Nothing further.

13 MR. LUCAS KASTER: I just have a quick follow-up.

14 THE COURT: Certainly.

15

16 **RECROSS-EXAMINATION**

17 BY MR. LUCAS KASTER:

18 Q. Ms. Detlefsen, I believe you testified initially with
19 Counsel that you review allegations when they're going to be
20 dismissed, right?

21 A. I review investigations if the employee stands for
22 dismissal.

23 Q. You don't review when the employee gets a waiver.

24 A. I could have if we suggest a waiver after the fact.

25 Q. After the investigation.

1 A. After the investigation, that's right. If an employee
2 stands for dismissal, they need to work with PEPA, but
3 otherwise I wouldn't be involved in the waiver.

4 Q. Would you agree with me that according to your
5 interpretation of policy, these other employees who were
6 accused of falsifying payroll could have stood for
7 dismissal?

8 A. I would have to know more about the -- each indi -- you
9 showed me a lot of different cases and they seem to be
10 slightly different, but I did see some allegations of
11 falsifying payroll in there.

12 Q. But none of those things that I showed you showed up in
13 your synopsis, right?

14 A. I don't understand your question.

15 Q. The documents we just looked at that I went through with
16 you, none of those incidents appear in your synopsis.

17 A. No.

18 Q. So you didn't even know about them.

19 A. No.

20 MR. LUCAS KASTER: I have nothing further. Thank
21 you.

22 THE COURT: Ms. Detlefsen, you're excused. Thank
23 you.

24 THE WITNESS: Thank you.

25 THE COURT: Let me ask just a couple questions to

1 make sure I understand where we're at.

2 Is that the last witness BNSF intends to call
3 here.

4 MS. DONESKY: It is, Your Honor.

5 THE COURT: Does Mr. Sanders rest?

6 MR. JAMES KASTER: Yes, Your Honor, with notation
7 for the record. There's a Court Exhibit A that I will -- or
8 1 that I will offer that's consistent with the conversations
9 that we've had on that issue.

10 THE COURT: And that's admitted.

11 MS. DONESKY: And then we have one evidentiary
12 matter to take up on a break.

13 THE COURT: Great. All right. Thank you.

14 Members of the Jury, here's what we're going to
15 do:

16 We're going to break. I realize it's a bit early,
17 but to make things continue to move along, I need to meet
18 with the lawyers now and take care of some business.

19 Why don't you take an hour for lunch at this time.
20 As I said, I know it's early, but it works now, so we'll do
21 it.

22 Plan to resume proceedings at 12:45, so it will be
23 just a bit over an hour, but we should be able to get going
24 at 12:45 and continue on with our business today.

25 All right. The jury will adjourn at this time.

1 (Jury excused)

2 THE COURT: Thank you. Please be seated.

3 Ms. Donesky?

4 MS. DONESKY: Yes. I'll let Ms. Ferguson address
5 the --

6 (Defense counsel confer)

7 MS. DONESKY: We'd like to move for judgment as a
8 matter of law under Rule 50.

9 THE COURT: That motion is denied.

10 Ms. Ferguson?

11 MS. FERGUSON: Yes, Your Honor. I'm not sure if
12 the Court has received -- I know it's been filed -- the
13 declaration of Paul Balanon, together with the motion
14 related to the request to admit the OSHA record. I have a
15 copy of the declaration if that would be helpful.

16 THE COURT: It's been filed on ECF?

17 MS. FERGUSON: Yes, it has.

18 THE COURT: All right. And is there an objection
19 to that?

20 MR. JAMES KASTER: Yes, there is, Your Honor. I'd
21 like to be heard on it.

22 THE COURT: Okay. Why don't we hear from you,
23 Mr. Kaster, at this time on that issue then.

24 MR. JAMES KASTER: All right. Thank you, Your
25 Honor.

1 Specifically, we've talked about a couple of
2 objections to this. With respect to what Mr. Balanon states
3 in his declaration, as I mentioned, if the Court regards
4 that as sufficient foundation, then the objection really
5 goes beyond foundation.

6 It specifically -- and I will note this:

7 First of all, there's two letters that are
8 attached from OSHA. One gives the complainant the right to
9 appeal, so clearly indicates that his complaint with OSHA
10 has been dismissed. The second one is more of an
11 articulation of the basis upon which that occurred.

12 And I would just note that the Court will find a
13 letter attached to Lucas Kaster dated October 16th of 2017,
14 and I'm going to read from the letter in part:

15 "The evidence supports that Respondent has
16 established a credible defense justifying actions against
17 Complainant. FRSA does not protect an employee from
18 disciplinary actions for misconduct. OSHA finds that there
19 is no reasonable cause to believe that Respondent violated
20 FRSA. Therefore, this Complaint is dismissed."

21 This language about a credible defense is
22 completely misleading and does nothing to establish or
23 enhance the relevance of the fact that a complaint was
24 dismissed. If the Court is going to admit this document at
25 all, I submit that the first page, which is a letter to

1 Ms. Smith dated October 16th of 2017, or the second page,
2 redacting all of the findings, would be all that could
3 possibly be relevant, but having paragraphs in there that
4 announce the wrong standard for determining the viability of
5 a defense in this case, can only serve to mislead.

6 So, I object as I have in the past on the basis
7 that this document, if relevant at all -- and I doubt that
8 it is relevant at all -- is clearly -- its relevance is
9 substantially outweighed by any likelihood of confusion of
10 the issues.

11 So, that's my objection and I think further
12 elaborating on this record with this specific document --
13 and I would just note that I think this one is more
14 dangerous than the union grievance procedure, because the
15 union grievance procedure is clearly about a violation of
16 the union contract. This document is about a violation of
17 the FRSA, which is what the issue is in this case. So
18 having an announcement from OSHA on the wrong standard that
19 doesn't control the evidence in this case would clearly
20 mislead the jury and lead to, if it's argued at all, what
21 would be a completely improper argument.

22 THE COURT: Sorry, Mr. Kaster. I'm listening and
23 trying to read at the same time and I do believe that I
24 understand your concern, certainly at a high level. Let me
25 just read this letter if I could, please.

1 MR. JAMES KASTER: Sure, and I apologize if I was
2 going on while the Court was --

3 THE COURT: You were not.

4 (Pause - Court is reading)

5 THE COURT: Mr. Kaster, are you suggesting the
6 incorrect statement of the standard is the first -- which of
7 the three sentences in the last paragraph on the first page
8 of that letter are contending is legally incorrect, the
9 second?

10 MR. JAMES KASTER: The first sentence is legally
11 incorrect. The second sentence is arguably legally
12 incorrect because it doesn't account for pretext. And the
13 issue about whether there is reasonable cause is not before
14 the jury at all. The OSHA findings of reasonable cause give
15 rise to a hearing. There was no hearing here. So it's just
16 completely inapposite.

17 THE COURT: Let me hear from BNSF on this.

18 MS. FERGUSON: We argued this issue already in
19 response to Plaintiff's motion to exclude both the National
20 Railroad Adjustment Board and the OSHA findings, and I think
21 this Court ruled on this issue and we continue to take the
22 position we did in our briefings. The **Gunderson** case we
23 believe allows it, the declaration that we've submitted,
24 because our argument should come in under the public records
25 as simply an effort to show how this was received. The

1 letter to Ms. Smith can certainly be removed, but that's
2 just establishing how Mr. Balanon got it and what capacity
3 he received it. But again, as to the admissibility of this,
4 we rely upon the position taken in response to Plaintiff's
5 motion *in limine* to exclude this.

6 THE COURT: Mr. Kaster, is there anything else you
7 want to get on the record on this?

8 MR. JAMES KASTER: Yes, Your Honor. If relevant
9 at all, I do not understand the relevance of the last two
10 paragraphs on page 1 of the October 16th, 2017 letter and
11 why they would not be redacted. The simplest way to address
12 the potential prejudice is to remove what are confusing and
13 incorrect legal arguments on the facts as applied by OSHA in
14 their proceeding, and that accomplishes all of what could
15 possibly arguably be relevant about this.

16 THE COURT: I understand Plaintiff's position on
17 this, I do think we've been over it, and I am not inclined
18 to change my mind about the admissibility or -- well, the
19 admissibility of the document. I also believe that if
20 I'm -- just give me one second here and I can review this
21 affidavit one more time.

22 (Pause - Court is reading)

23 THE COURT: I'll overrule the objection and I'll
24 admit the exhibit.

25 MR. JAMES KASTER: Your Honor, one more thing for

1 the record.

2 THE COURT: Sure.

3 MR. JAMES KASTER: I am presuming that the Court
4 will not permit argument that goes to these last two
5 paragraphs, that that logic is somehow applicable here, the
6 last two paragraphs on page 1 of the October 16th, 2017
7 letter.

8 THE COURT: I certainly won't permit argument
9 suggesting to the jury that they face the same task that the
10 agency faced in adjudicating this matter.

11 As I indicated earlier when we talked about this
12 this morning, it's easy for me to see gray area there pretty
13 quickly. But I am going to be sensitive to that and we do
14 have an instruction on it and I will have my ears perked up
15 and take I guess what I would call a plan to take going in,
16 at least, a fairly conservative line with respect to how
17 hard or how much folks can argue the impact of these
18 decisions beyond relevance on these proceedings.

19 MR. JAMES KASTER: Your Honor, I also presume the
20 Court would allow us to argue what is in fact true, which is
21 that Mr. Sanders did not have a hearing before OSHA, that no
22 one evaluated the credibility of witnesses, that this was a
23 paper determination at this point and that Mr. Sanders
24 pursuant to the law has a right to then exercise a right to
25 appeal, which is this trial.

1 THE COURT: *De novo* review.

2 MR. JAMES KASTER: *De novo*. Thank you.

3 THE COURT: Anything further from BNSF?

4 MS. FERGUSON: Nothing further.

5 THE COURT: All right. Why don't we take five. I
6 have revised jury instructions ready to go. We can
7 distribute those, you can review them.

8 I'll give you a preview. The revisions are to the
9 protected activity description consistent with BNSF's
10 concerns. I modified the comparator instruction a bit, but
11 not to its substance, and here's why.

12 There's plenty of law out there that tells me what
13 I'm supposed to do if I'm reviewing comparators for pretext.
14 I don't understand that that's what BNSF is doing when it's
15 introducing -- I'll call it comparator, but that's an
16 imprecise term -- evidence of others as it did just now with
17 Ms. Detlefsen on the stand. And I haven't found a case or
18 anything that comes to mind that suggests that that evidence
19 faces the same standard as comparator evidence in the
20 context of a pretext argument. So that's the reason I've
21 sort of stuck with the gist of the initial draft of the
22 instruction. And since I was reconsidering that and since I
23 did go through a couple of additional drafts of it, I
24 thought I would share those previews, at least, before I
25 distribute those instructions.

1 So, take five. Well, let's say ten minutes. I'll
2 come back in about noon, we'll go over those, give everybody
3 an opportunity to get any objections on the record that they
4 have, and then we will -- and a revised verdict form and we
5 will continue on from there. Make sense?

6 MR. JAMES KASTER: I understand what the Court has
7 said.

8 THE COURT: I don't mean to -- you'll have an
9 opportunity to get objections on the record and I'm not
10 confessing certainty about that. I'm just saying I've
11 looked into it, I've done my best just to try to figure out
12 what law applies in that situation, and at least to the best
13 I can determine it's not the same standard that Plaintiff
14 faces, thus the instruction. But you'll see.

15 All right. So let's take ten. We'll get those
16 distributed and plan to start up right after noon on that
17 piece of it. Thanks, everyone.

18 (Recess taken at 11:50 a.m.)

19 * * * *

20 (12:10 p.m.)

21 IN OPEN COURT

22 (Without the jury)

23 THE COURT: Please be seated everyone.

24 Let me start with BNSF first. Apart from the
25 objections that you raised earlier and that I've overruled,

1 are there any additional objections to the material that's
2 been amended?

3 MS. DONESKY: No, Your Honor.

4 THE COURT: All right. Let me give Plaintiff an
5 opportunity to get on the record objections that they may
6 have to any of the revisions or anything that I did not
7 revise that we discussed earlier this morning.

8 MR. JAMES KASTER: Your Honor, the protected
9 activity description is not as particularized as the Court's
10 initial version. It's broader. I mean, it tracks the law
11 and the subdivisions that were claimed, so it's not in any
12 sense misleading. It's just not as helpful to the jury in
13 understanding what is factually applicable, but I don't have
14 any objection to it *per se*.

15 I also don't object to the verdict form being more
16 specific. This tracks how many courts will handle exactly
17 this kind of matter.

18 With respect to the similarly situated issue, I'd
19 just say this, Your Honor: I heard, I think I understood
20 what the Court said.

21 With respect to the exclusion of Exhibits 219 and
22 220, it wasn't clear to me if the Court was saying that the
23 plaintiff has an evidentiary standard that is this
24 (indicating) big and they have an evidentiary standard
25 that's this (indicating) big.

1 It can't possibly be true that they offer evidence
2 of other people under different supervisors and with
3 different circumstances, that that does not open the door.
4 If they're cherry-picking the evidence to demonstrate that
5 everyone gets terminated, it seems to me that that opens the
6 door to an argument that no, they don't. You're
7 cherry-picking. So the evidentiary standards for
8 consideration of the evidence have to be the same. Both
9 sides have the same strike zone. There might be different
10 arguments for why one comes in or the other one doesn't, but
11 the strike zone has to be same.

12 THE COURT: I think different issues. That's
13 where I'm -- and I guess that's what I'm saying. That's
14 where I'm looking for help. On the one hand, Mr. Sanders is
15 alleging that BNSF's termination decision was pretextual and
16 in support of that argument he is identifying two or
17 three --

18 MR. JAMES KASTER: Actually, Mr. Mozinski
19 testified that there were five people. We have three
20 specific examples.

21 THE COURT: Three comparators, and the law there
22 is clear. It seems to me that there is a different issue,
23 which is does BNSF's PEPA department terminate -- does
24 BNSF's PEPA department -- maybe it's broader than the PEPA
25 department -- terminate every employee who engages in time

1 theft, or is it aware that every employee who engages in
2 time theft is terminated.

3 I guess rightly or wrongly I'm seeing that as
4 something of a different issue, and I agree with you that
5 strike zone needs to be the same, but the two exhibits as to
6 which I sustained an objection, as best as I could tell in
7 realtime, didn't have anything to do with time theft. They
8 had to do with different issues. So that was the reason --
9 and then the reason I overruled the objection to the one
10 after that was it was payroll theft which I understood to be
11 time theft. Now, I may have been wrong about that, but
12 that's the call I made in realtime and that's the way it's
13 going to be.

14 MR. JAMES KASTER: Sure. I understand that, Your
15 Honor. I think I've been heard --

16 THE COURT: Okay.

17 MR. JAMES KASTER: -- so I'll shut up now.

18 (Laughter)

19 THE COURT: All right.

20 MR. JAMES KASTER: Maybe I won't. Hold on one
21 second.

22 THE COURT: Right, yeah.

23 MS. DONESKY: Your Honor, if I may be heard on the
24 special verdict form briefly.

25 THE COURT: Yes.

1 MS. DONESKY: The only remark I noted -- let me
2 find it again. If they reach damages, it strikes me that it
3 should have "if any" or "none." It reads -- it's a little
4 misleading in that it almost reads that there has to be some
5 number put in there, and so typically the verdict form
6 should have either "if any" in the sentence or "none"
7 underneath a line, either of which we would request.

8 MR. JAMES KASTER: I'm not hearing what's going on
9 here.

10 MS. DONESKY: I made a comment on the special
11 verdict form, that if the jury were to reach damages, it
12 should have "if any" or "none" under the line so that -- you
13 still have to prove damages, and it reads currently as
14 though --

15 THE COURT: Understood, yeah. So here's what I'm
16 going to do. I will add: "through the date of our verdict,
17 if any, in the following amount."

18 MS. DONESKY: Thank you.

19 THE COURT: And then with respect to "emotional
20 distress, if any, in the following amount." So preceding
21 "in the following amount, I'll put: "if any,."

22 Okay. Any other comments on the special verdict
23 form from BNSF?

24 MS. DONESKY: No, Your Honor.

25 THE COURT: Okay. Mr. Kaster, let's return to the

1 other issue for a moment.

2 MR. JAMES KASTER: Well, my smarter co-counsel
3 pointed out to me that the language that the Court has put
4 in the *prima facie* case instruction does not exactly track
5 the statute and doesn't provide for protection for
6 assisting. "To provide information" -- I'm reading from the
7 statute now -- "directly cause information to be provided.
8 Or otherwise directly assist in any investigation regarding
9 any conduct," blah, blah, blah.

10 THE COURT: I didn't think that was at issue here,
11 but let me just make sure that I'm understanding where
12 you're looking at.

13 Yeah. So we addressed this in our -- I think we
14 addressed this in our summary judgment decision and we were
15 not under the impression that assisting in an investigation
16 within the ambit of the statute was at issue here. If I'm
17 wrong about that, tell me.

18 MR. JAMES KASTER: I'll let -- Luke, you go ahead
19 here.

20 MR. LUCAS KASTER: Your Honor, I don't
21 specifically recall that issue, but I know there was
22 significant briefing on the fact that Mr. Sanders had filed
23 several complaints with human resources and participated in
24 those investigations. And so I don't recall off the top of
25 my head the specific language from the Court's order, but

1 I'm not sure how it wouldn't be at issue when it has been a
2 subject of the briefing and was part of what we pled in the
3 initial complaint was that he had participated in these
4 various investigations with human resources.

5 THE COURT: Into complaints that he had filed.

6 MR. LUCAS KASTER: In our complaint and the
7 briefing. I was talking about our -- the complaint in this
8 case as opposed to his HR complaints.

9 THE COURT: Understood. So he participates --
10 well, he otherwise directly assists in any investigation,
11 but how?

12 MR. LUCAS KASTER: By providing the recordings, by
13 providing a statement, by providing evidence, the names of
14 the individuals who --

15 THE COURT: In connection with his own complaints.

16 MR. JAMES KASTER: Correct.

17 THE COURT: Okay. Is BNSF opposed to adding that
18 verbiage into the definition of protected activity?

19 MS. DONESKY: We are. I don't know that you can
20 wear both hats in that regard. I mean, he was the person
21 who brought the report. I don't believe the assisting
22 element or prong of that applies here.

23 (Pause)

24 THE COURT: All right. I'll include it. I'm not
25 sure how it's different from providing information and I do

1 think it adds to the cumbersomeness of what is sort of an
2 already cumbersome definition given the breadth of activity
3 here that Mr. Sanders claims is at issue, but I'll do it.

4 MR. LUCAS KASTER: I think it provides clarity. I
5 understand what the Court is saying in terms that it's not
6 only the providing of the information, but I also think the
7 contact with the FRA as well falls under this potentially
8 assisting section, and I think it provides some clarity to
9 the jury that it's not just the providing of the
10 information, but it's going through with the investigation
11 and assisting in that investigation as well.

12 THE COURT: Let me make the edit on the fly here
13 on the bench. Sorry to make everybody sit here while I do
14 this.

15 (Pause)

16 THE COURT: So that subpart (a) in the description
17 of protected activity which now shows up in three places in
18 the instruction would include the following after "providing
19 information": "or otherwise directly assisting in any
20 investigation regarding any conduct which Mr. Sanders
21 reasonably believed," et cetera.

22 Mr. Kaster?

23 MR. LUCAS KASTER: That sounds good, Your Honor.

24 THE COURT: I think it tracks the statute.

25 I understand BNSF has concerns about adding that

1 or I guess I should just say objects to adding that, but let
2 me ask just as a matter of verbiage, I think I've got that
3 in the right spot.

4 Do you have an objection about the inclusion of
5 that relative to statutory language?

6 MS. DONESKY: We just maintain the objection we've
7 made earlier.

8 THE COURT: Okay. Great.

9 All right. Anything further on the jury
10 instructions that we need to deal with?

11 MR. JAMES KASTER: Nothing from Plaintiff, Your
12 Honor. Thank you.

13 MS. DONESKY: No, Your Honor.

14 THE COURT: Okay. Great. Then we will get those
15 finalized. Here's my intent with respect to the jury
16 instructions:

17 Each member of the jury will receive a copy. I
18 will leave -- my intention unless somebody raises a good
19 objection here, my intent is to leave in the title of each
20 jury instruction; however, my intent also is to take out
21 references to authority for the instruction. Let me stop
22 there and ask: Is the plaintiff good with that?

23 MR. JAMES KASTER: Sure, Your Honor.

24 THE COURT: Okay. BNSF?

25 MS. DONESKY: That's fine.

1 THE COURT: And then just a heads-up.

2 When I instruct the jury and they're sitting there
3 with the instructions in hand, one of the prefatory comments
4 that I typically try to make as eloquently as I am able
5 under the circumstances is that I appreciate how unusual it
6 might be for them to be holding something that I am about to
7 read to them. That's not something most people have done or
8 have had done for them since they were quite young and it is
9 a bit jarring for folks. But apart from any instruction
10 that's written here, I do like to explain to them just the
11 fact that this is important, that we need to get it on the
12 record, that I can't just let them read it, and that's the
13 reason this procedure is the way it is and it has been so
14 for quite some time.

15 I assume nobody has a problem with that.

16 Okay. I'm seeing shaking heads, for the record.

17 Okay. In terms of closing arguments, have you all
18 discussed how you would like to do this, or have you agreed
19 upon a procedure, or can we just follow the local rule?

20 MR. JAMES KASTER: I don't know that we've
21 discussed it, Your Honor.

22 THE COURT: If we follow the local rule, BNSF goes
23 first and you go second with no opportunity for rebuttal.

24 MR. JAMES KASTER: Right.

25 THE COURT: Okay.

1 MR. JAMES KASTER: And that's the convention.

2 THE COURT: Yes.

3 MR. JAMES KASTER: And yes, that's what we'll do.

4 MS. DONESKY: With no opportunity for rebuttal?

5 THE COURT: Correct.

6 MR. JAMES KASTER: Is the Court inclined to take a
7 break between the arguments or not? I mean, it's up to you,
8 obviously, Your Honor, but sometimes --

9 THE COURT: Very brief.

10 MR. JAMES KASTER: Very brief would be good just
11 so people don't have a distraction.

12 THE COURT: Very brief.

13 MR. JAMES KASTER: Okay.

14 THE COURT: Actually, let me put a caveat on that.
15 If Plaintiff's argument -- or if Defendant's
16 argument, I guess I should say, does not occupy the entire
17 hour that the local rule allows and happens to be quite less
18 than an hour, then I do not intend to take a break.

19 MR. JAMES KASTER: Fair enough.

20 THE COURT: But if it's north of 45 minutes, yes,
21 in all likelihood we'll take a very brief break.

22 MR. JAMES KASTER: It will allow for setup anyway.

23 THE COURT: Okay.

24 MR. JAMES KASTER: So are we coming back at
25 quarter to?

1 THE COURT: Yes, we will resume proceedings --
2 actually, let's do this: Let's resume proceedings at ten to
3 promptly. We will begin then. My intention, for what it's
4 worth, would be that I begin to instruct the jury
5 immediately upon the conclusion of Plaintiff's closing
6 argument.

7 MR. JAMES KASTER: Okay. Thank you, Your Honor.

8 THE COURT: All right. We'll recess until ten to.
9 (Recess taken at 12:28 p.m.)

10 * * * *

11 (12:50 p.m.)

12 IN OPEN COURT

13 (Without the jury)

14 THE COURT: Please be seated, everyone.

15 Ms. Donesky?

16 MS. DONESKY: Yes, Your Honor. We wanted to
17 clarify just so we don't enter into arguments and have
18 issues with objections. But as to the issue we've been
19 addressing with the NLRB and OSHA decisions, I just want to
20 be up front that I do plan to read from each decision an
21 excerpt from it, and I would rather address it up front in
22 advance of argument so that it doesn't compel the plaintiff
23 to object at that time and disrupt with the jury.

24 THE COURT: Reading from it is fine. Arguing in
25 any way, shape or form that it absolves this jury of their

1 independent duty to make a *de novo* determination regarding
2 Mr. Sanders' claim is a problem.

3 MS. DONESKY: It's going to be read in the context
4 of this decision has been reviewed at multiple levels and
5 these are two of the levels in which it's reviewed.

6 THE COURT: I don't see a problem with that.

7 MS. DONESKY: Okay.

8 THE COURT: Mr. Kaster, you look like you're
9 contemplating.

10 MR. JAMES KASTER: I always look like that, Your
11 Honor. It doesn't mean anything.

12 We maintain our objection to any discussion or
13 argument about the exhibits. I understand what the Court
14 has said.

15 THE COURT: Okay. Terrific. Can we get the jury
16 in here?

17 MR. LUCAS KASTER: Your Honor, I wanted to just
18 raise one issue.

19 There is an unclarity about in particular
20 Plaintiff's Exhibit 22, which is a very long Excel file that
21 spans I think 30 pages or something like that and is broken
22 up over multiple -- the spreadsheet is -- basically the
23 first, for example, 10 or 12 pages are, you know, the first
24 ten or 12 columns. Then you have to sort of connect it to
25 the next columns.

1 We created a summary exhibit which we had provided
2 to defense counsel before trial. We're asking that that be
3 admitted as well, along with that exhibit, because the
4 exhibit itself is just extremely hard to understand and
5 grasp.

6 And so my understanding is there hasn't been an
7 objection to the underlying exhibit, that it was admitted at
8 the start of trial, and there hasn't been an objection to
9 the summary that we had provided to defense counsel. So
10 just for ease of reference we're asking that the summary be
11 provided to them as well.

12 THE COURT: Where is the summary?

13 MS. PATHMANN: I'm pulling it up right now.

14 (Exhibit displayed)

15 THE COURT: Is there an objection to providing the
16 summary to the jury?

17 MS. FERGUSON: I don't see any basis to provide
18 that. There's been testimony about it. They've sort of put
19 it in the way they want it viewed by the jury, so I don't
20 think it's appropriate.

21 THE COURT: Who testified about this? Can you
22 remind me, Mr. Kaster?

23 MR. LUCAS KASTER: There was testimony from
24 Mr. Jones about the number of days that he had worked. My
25 recollection is that we had gone through this exhibit. We

1 checked. It didn't appear as though it was -- this specific
2 exhibit was referenced. We couldn't find -- at least in the
3 record. It's in my notes. My recollection is that we went
4 through it and I showed it to Mr. Jones to indicate how many
5 days he had worked, how many days of overtime he had worked,
6 but just in a brief search with the court reporter we
7 weren't able to locate testimony specific to this exhibit at
8 this point. And so if the Court's not going to admit it to
9 provide to the jury, it is in my closing as an illustrative
10 exhibit, a summary of that exhibit.

11 THE COURT: You can use it during your closing as
12 a summary, a demonstrative, but I'm not going to allow it to
13 be admitted.

14 MR. LUCAS KASTER: Understood.

15 THE COURT: Thank you.

16 MR. LUCAS KASTER: Thank you.

17 THE COURT: That cover everything? One more
18 opportunity here, everyone.

19 (Laughter)

20 MR. JAMES KASTER: I think that's everything.

21 MR. LUCAS KASTER: Nothing from Plaintiff, Your
22 Honor. Thank you.

23 THE COURT: How about from BNSF?

24 MS. DONESKY: No, not at this time.

25 THE COURT: Who will be doing the closing on

1 behalf of BNSF?

2 MS. DONESKY: I will be.

3 THE COURT: Okay. And Mr. Lucas Kaster, I
4 assume -- it sounds like you'll be doing the closing on
5 behalf of Mr. Sanders?

6 MR. LUCAS KASTER: I will.

7 THE COURT: Okay. Terrific. Let's bring the jury
8 in.

9 (Jury enters)

10 THE COURT: Please be seated.

11 Ms. Donesky?

12 MS. DONESKY: Thank you.

13 **DEFENDANT'S CLOSING ARGUMENT**

14 MS. DONESKY: This case is about time theft,
15 stealing from the company. And not just once, but on three
16 separate days, three days observed, and on all three days
17 Mr. Sanders stole time by claiming more hours than he
18 actually worked.

19 That's a hundred percent violation, right, a
20 hundred percent. It's like batting a thousand in baseball.
21 It was stealing. And not for insignificant amounts of time
22 and nothing gray about it, nothing ambiguous about it. You
23 saw the records. You've seen the evidence, Ms. Hoppenrath's
24 direct personal observations of Mr. Sanders on those three
25 days, objective irrefutable evidence that he sought to be

1 paid for more hours than he actually worked.

2 You saw the track and time authority records, you
3 saw the PARS records, you saw the vehicle date records of
4 time stamps. They aligned. They aligned each time with
5 what Ms. Hoppenrath had observed.

6 On March 19th he was observed working shy of five
7 hours, but reported working eight. His own GPS records
8 don't even place him at the Bridal Veil location that he
9 claimed to have been to account for the early morning hours
10 that he stole.

11 March 25. He claimed 8.5 hours of time, all
12 overtime hours from minute one, but only worked three hours
13 and fifteen minute. Indeed, Mr. Sanders admits he entered
14 that 8.5 hours of time knowing it was wrong, but yet never
15 sought to change his time on March 26th, on March 27th,
16 March 28th, or even in the morning of March 29th. Indeed,
17 he did not seek to change it until he knew he had been
18 caught.

19 The same with March 26. He claimed nine hours of
20 time, but only worked about five hours. Even with changing
21 the time to eight, he still stole three hours. And even the
22 changes he made, he made those after he received those
23 hearing notices for alleged time theft, after he knew, and
24 even then he didn't report his time correctly.

25 Mr. Sanders had layers upon layers of review and

1 process. As a unionized employee, he had tremendously more
2 process and review than the average American. Mr. Sanders
3 was afforded two separate hearings held in accordance with
4 his collective bargaining agreement to review the facts and
5 circumstances of his alleged conduct and for which he had
6 union representation throughout.

7 Following these hearings a multilevel review
8 process was undertaken which included review by a labor
9 relations representative who had no skin in the game to
10 retaliate against Mr. Sanders. She did not know Mr. Sanders
11 and knew nothing about his alleged protected activity. It's
12 her job to conduct an independent review of the hearing
13 record, and you heard from her this morning and she said
14 exactly that. She did not rely on Mr. Jones'
15 recommendation. She wanted the record, and that's what she
16 reviewed and that's what she based her decision on.

17 And when you hear later when I speak of our
18 affirmative defense of whether BNSF would have reached the
19 same decision regardless of any protected activity, you
20 think of Ms. Detlefsen and her independent review and the
21 independent review conducted by others in the process. That
22 is establishing that affirmative defense.

23 But Mr. Sanders had even more than a labor
24 relations review. He had more beyond that. He had the law
25 department who reviewed. Human resources looked at it, the

1 general manager looked at it, and two governmental bodies
2 looked at Mr. Sanders' dismissal for time theft. They all
3 concluded dismissal was proper.

4 In May of 2019, a neutral government arbitrator
5 held -- if you can bring up the slide.

6 The NARB concluded on May 17th of 2019:

7 "There is substantial evidence in the record upon
8 which to conclude that the Claimant falsified his time
9 records by submitting payroll records claiming that he
10 worked more hours than he actually worked. Specifically,
11 there is substantial evidence that the Claimant submitted a
12 payroll entry for March 19, 2016 for eight hours when he
13 actually worked five hours, and that he submitted an
14 adjusted payroll entry for March 25th, 2016 for 4.5 hours
15 when he actually worked three hours and 13 minutes.

16 "There is substantial evidence in the record that
17 the Claimant acted dishonestly by falsifying his payroll
18 entries. Under PEPA, dishonesty is a standalone dismissible
19 offense, so the Claimant's dismissal was within the
20 parameters set by the policy and, therefore, was not
21 excessive."

22 In 2017, OSHA also reached the following
23 conclusion:

24 "The evidence supports that BNSF has established a
25 credible defense justifying the actions taken against

1 Mr. Sanders. FRSA does not protect an employee from
2 disciplinary actions for misconduct. OSHA finds that there
3 is no reasonable cause to believe that BNSF violated FRSA;
4 therefore, this Complaint is dismissed."

5 Aside from the record before you establishing the
6 violations in question and even beyond all the levels of
7 review, you also have before you what are two separate and
8 unrelated events. There is on the one hand what Mr. Sanders
9 claims to be his protected activity and over here
10 (indicating) the separate and unrelated misconduct of
11 stealing time. There is no connection between the two,
12 nothing, zero. All Mr. Sanders has sought to do is weave
13 together a disjointed and speculative theory that BNSF
14 managers were somehow motivated to get rid of Mr. Sanders
15 for reporting defects he made while working as a track
16 inspector. But consider this: He raises this conjecture
17 despite having admittedly reported hundreds and thousands of
18 defects over six years, six years of track inspecting, and
19 moreover having never been disciplined or suffered any
20 adverse consequence for making such reports, in fact
21 identifying and reporting defects. That's the very reason
22 for the purpose of his job.

23 No matter how hard he tries, Mr. Sanders simply
24 cannot connect the dots between his unrelated track
25 reporting activities and the time theft that he

1 independently committed in March of 2016. Even if he could,
2 BNSF would have reached the same decision regardless.

3 Let me address the recordings. You heard only
4 snippets of a handful of recordings from, keep in mind, some
5 70-plus recorded conversations that were not played to you.
6 But as to the snippets that were played, that was hard to
7 listen to. I was cringing in my seat and I'm sure you were
8 as well. Profanity of that kind has no place in the
9 workplace, but BNSF addressed it. They took it seriously,
10 they assessed Mr. Jones formal counseling, coaching, which
11 as a manager is formal discipline. It's a disciplinary
12 event and it went permanently into his personnel file, and
13 if it continued, it would lead to more discipline, including
14 dismissal. And it activated an anti-retaliation process at
15 that time, as of December 15th, after which he was
16 informed -- and his letter indicates -- if action against
17 someone who brought a complaint could lead to discipline,
18 there needed to be additional levels of review. Why? To
19 ensure that the action that was taken was not for
20 retaliatory reasons. And you saw the evidence come through
21 over these last few days, the independent reviews that were
22 done to ensure that retaliation was not what was the reason
23 for the dismissal.

24 Engaging in protected activity under the law does
25 not immunize an employee from discipline. It doesn't. But

1 what BNSF undertook and to ensure that the discipline was
2 done for non-retaliatory reasons were these different levels
3 of review.

4 But let me tell you, Ladies and Gentlemen of the
5 Jury, why knows snippets were played for you. They were
6 played early in trial. They were played to try to gin up
7 your emotions and focus your attention elsewhere, away from
8 the fact that Mr. Sanders (indicating) engaged in time
9 theft, and he was dismissed for time theft, but let me also
10 remind you of another couple points regarding those
11 recordings or the contents of them, and I want to just JUCHT
12 touch on the FRA call from November of 2015.

13 As the jury instructions will explain, to be
14 protected, protected activity has to be done in good faith.
15 Mr. Sanders called FRA in November 2015. It was not done in
16 good faith. It was undisputed the FRA does not regulate
17 wrap bars. Mr. Sanders already knew that when he contacted
18 the FRA about the issue and he admits that. He also admits
19 that FRA said BNSF was right in what they were doing.

20 Consider too the time and manner in which a number
21 of the reports and track defects were reported, only after
22 individuals like Mr. Chartier or Ms. Hoppenrath were trying
23 to manage, instill policy and practices in late 2015.

24 You also recall there are two sets of
25 instructions. There are the FRA track rules, but then there

1 are also the BNSF engineering instructions. FRA, as you
2 heard Mr. Chartier speak to, is the bare minimum.
3 Engineering instructions go over and above that. They go
4 over and above what the federal rules and regulations
5 provide. And so as he explained, there might be a situation
6 or a defect that perhaps isn't in compliance with BN's own
7 engineering instructions, but that they aren't violating the
8 FRA, which are the bare minimum below, and you can have
9 defects that did not even implicate federal law, rule, or
10 regulation.

11 And has Plaintiff identified for you even a single
12 federal law, rule, or regulation that BNSF supposedly told
13 Mr. Sanders or instructed him to violate? They have not.
14 In fact, they only want to speak in general terms of issuing
15 slow orders and identifying track defects without specifics
16 or details. But just like measurements, track defects,
17 they're not based on feelings as Mr. Chartier said. They're
18 parameters and there are measurements, and the same holds
19 true here. For protected activity to be protected there has
20 to be some identification of a rule or regulation that was
21 violated. They have not done that.

22 It's also important, Members of the Jury, to not
23 forget common sense. Throughout your proceedings, consider
24 the common sense here.

25 Safety is paramount at BNSF. It wouldn't be in

1 business without it. Yes, BNSF is a company in business to
2 make profit, but what for-profit company isn't? Mr. Sanders
3 would have you believe that BNSF is singularly focused on
4 making money at the expense of safety, but that is simply
5 not true, its top priority. In fact, BNSF employs hundreds
6 of inspectors just like Mr. Sanders to ensure the safety of
7 the tracks on which the trains operate. Mr. Sanders himself
8 worked as a track inspector whose very job it was to report
9 defects, issue slow orders where necessary, and then to get
10 them fixed, but BNSF goes beyond that in its safety
11 measures.

12 As you've heard many witnesses testify, they have
13 geometry cars. The very purpose of geometry cars are to
14 inspect cars and pull them by train and to identify even
15 other defects and track defects that the inspectors might
16 not identify. They use them why? To make sure the trains
17 run on safe track and that if there are defects, they
18 identify them, protect them and repair them.

19 Separately, there's FRA track inspectors. There's
20 state inspectors. There's multiple layers of checks and
21 balances for the very reason to identify defects, issue slow
22 orders and repair the track as needed.

23 You heard about this tension that exists between
24 the need to -- it's only one track and transportation runs
25 the trains on those tracks, and maintenance has to get on

1 those tracks to make those repairs. It's a natural tension,
2 but that doesn't mean that they were not looking to report
3 slow orders when necessary or identify defects. So please
4 do not forget your common sense in regard to how BNSF
5 engages in the safety measures that are necessary. And
6 think about it. Having unsafe tracks? How risky and costly
7 that could be. A derailment is costly and costs impact
8 revenue and profit. BNSF cannot make money without
9 operating safely. The two go hand in hand. They are not
10 mutually exclusive as Mr. Sanders would have you believe.

11 Timing. I'd like to talk about timing, because at
12 the end of the day that is all Mr. Sanders claims to have,
13 but as you will hear when the judge instructs you, timing
14 alone is not enough. He has to prove more. In fact,
15 Mr. Sanders is required to prove to you that BNSF acted with
16 the intent to retaliate for his protected activity -- let me
17 repeat that -- the intent to retaliate, and he has not met
18 that burden.

19 First off, five months. That's the time period
20 when even giving Mr. Sanders the benefit of the doubt of his
21 December 5 complaint to HR and his April 29th dismissal,
22 that alone is too attenuated of a timing.

23 So how does Mr. Sanders try to overcome this fatal
24 defect? He points to various actions taken into the interim
25 period, but none of these actions show intentional

1 retaliation. Let's look at some of those.

2 The 4/10 schedule. Mr. Sanders seeks to rely on
3 the fact Mr. Sanders met with HR, Magenta Eggertsen, on
4 December 7th, and when Ms. Hoppenrath communicated to
5 Mr. Sanders to return to his bid schedule of 5/8s, that
6 there was some timing of only three days and that somehow
7 those two are connected, but have they produced any evidence
8 that Ms. Hoppenrath had any specifics, or information, or
9 knowledge regarding that first HR complaint that Mr. Sanders
10 made? Ms. Eggertsen and Mr. Sanders met on the 7th
11 according to the record. She wasn't in the meeting. She
12 hadn't been interviewed. There's no evidence of what
13 details whatsoever she knew of that complaint.

14 And keep in mind the change that was made.
15 Mr. Sanders had changed on his own to 4/10s. The bid
16 schedule was a 5/8 schedule. She was simply trying to align
17 her team with the others who all were on a 5/8 schedule.
18 Mr. Sanders' position was a CBA-governed position. They
19 were just beginning in October to think about when
20 Ms. Hoppenrath had started to implement the roadmaster
21 expectations. Those date back to October of 2015, well
22 before the December 1st complaint. She had wanted to start
23 meeting the crew at 7 a.m. that morning, and for good
24 reason. She wanted face-to-face meetings with her team.

25 The change was aligning with the Collective

1 Bargaining Agreement and what it had not -- and she even
2 took extra steps to contact the former supervisor to make
3 sure she hadn't made a mistake, to see if maybe he had given
4 him permission, but it turned out not to be the case. It
5 was a legitimate change.

6 Same with the company vehicle policy. Plaintiff
7 also relies on this change or a difference that affected
8 Mr. Sanders is somehow connecting the dots to the various
9 attenuated, untreated events.

10 First off, the company policy is clear. It
11 requires a good business need and supervisor approval. And
12 back when the oil boom was going and there was need for
13 greater and quicker response times, it made sense. But you
14 heard the testimony from Ms. Hoppenrath, Mr. Chartier and
15 Mr. Jones. In the fall of 2015 that oil traffic began to
16 slow down. They had more time. They had time to look at
17 policies, they had time to review those, but they also were
18 looking much more closely at budgets, fuel costs, all
19 legitimate things that they have the right to and were
20 looking at.

21 But moreover, it was across the board. The idea
22 that the company vehicles were going to go back to the yards
23 wasn't just against Mr. Sanders. It was the division. All
24 the roadmasters had to look at the use of company vehicles
25 and who it impacted, and you heard from Mr. Chartier. His

1 trackmaster, Mr. Petersen, also had to return his company
2 vehicle and have it be at the yard. He lost it too.
3 Mr. Sanders was not the only one.

4 The timing and reliance on that information simply
5 does not create any inference that Mr. Jones or
6 Ms. Hoppenrath were out to retaliate against him. The
7 observation of four days only had passed when Mr. Sanders
8 returned to Ms. Hoppenrath's territory. I think that's
9 another timing window that the plaintiff, I anticipate, will
10 rely on.

11 But by the way, let's pause on that for a moment.
12 Mr. Sanders wants you to believe that Ms. Hoppenrath and
13 Mr. Jones were out to get him, but with respect to
14 Ms. Hoppenrath in particular, if things were so bad, how is
15 it that Mr. Sanders voluntarily elects in March of 2016 to
16 return to Dayton's Bluff. Who supervises Dayton's Bluff?
17 Blaine Hoppenrath. He elected to go back to report to her
18 in March. Again, common sense.

19 In March of 2016, turning -- and then also, think
20 about that four-day timing. It's not necessarily four days.
21 You heard Mr. Chartier explain that there's a bid, a
22 voluntary 19A voluntary return, and he, Mr. Sanders, bid off
23 his territory March 4th, two weeks earlier than that. And
24 so the reliance on this March 15th date and short time
25 period indicates for Mr. Chartier that that was not in fact

1 the case.

2 But regardless, Ladies and Gentlemen of the Jury,
3 even if it was four days following his return, it is
4 undisputed that Mr. Sanders engaged in his own intervening
5 conduct. And there's a principle in the law where a causal
6 connection that is attempted to be created is severed. It's
7 severed when the plaintiff engages in intervening
8 unprotected conduct of his own accord such that any attempt
9 to create a timing connection is lost as a result, and that
10 conduct is the conduct that Mr. Sanders engaged in in March
11 of 2016.

12 Consider what made Ms. Hoppenrath choose to go
13 observe Mr. Sanders on March 19th. It was March 18th, the
14 day before, he indicated to her that he was going to leave
15 and could not stay past 3 o'clock, and she observed that he
16 had left early and it caught her suspicion. That's not
17 Ms. Hoppenrath's conduct. That's not Mr. Jones' conduct.
18 That's Mr. Sanders who did so, and that is why she ended up
19 watching him. The indicia, therefore, that Plaintiff then
20 seeks to rely on to then further suggest there's a
21 retaliatory intent here also does not prevail. Let's look
22 at each of those.

23 This idea of the surveillance. Plaintiff claims
24 that that was so suspect for BNSF to personally observe
25 Mr. Sanders on March 19th and the subsequent days in a

1 vehicle. They didn't go rent a vehicle for that purpose
2 alone. You heard Ms. Hoppenrath explain that that was a
3 vehicle -- it was a rental, but it was from Mr. Jones having
4 had his company vehicle in the shop. It was used for that
5 purpose to observe him, but they didn't go off and rent it
6 for that purpose alone.

7 And think about surveillance. I mean, how else
8 are you supposed to view an employee in their conduct when
9 they don't believe somebody's watching? And BNSF does
10 conduct surveillance. You saw the records this morning.
11 They've surveilled other employees. And it's what cameras
12 are for, surveillance cameras. They're in our world. They
13 have a purpose. There's nothing suspect by the fact that
14 they did surveillance.

15 You also heard the fact about there were two
16 hearing notices that were issued for Mr. Sanders. This is a
17 collective bargaining agreement. There are different timing
18 and timing time limits that apply depending on the
19 circumstances, but you also heard Ms. Detlefsen testify that
20 she has seen many instances where multiple hearings are
21 issued to employees for alleged violations. That too was
22 not so unique and so unusual that it would create any
23 inference of a retaliatory intent.

24 They walked him off the property, another supposed
25 indicia of intent to retaliate. It is not. Look at the

1 Collective Bargaining Agreement. The agreement that
2 Mr. Sanders' union and negotiated and agreed to includes a
3 provision that employees can be held out of service pending
4 an investigation. That's the same provision under which
5 Mr. Sanders was held out of service. Look at other
6 employees in the record, Mr. Klukas, who the plaintiff
7 relies on. Look at his notice letter. Same type of notice
8 letter that Mr. Sanders received. He too was held out of
9 service. Look at the multiple dismissals we looked at this
10 morning. Several of them were held out of office. There's
11 nothing sinister in those facts.

12 They removed Mr. Sanders' access from the systems,
13 another supposed indicia of retaliatory intent. No, it's
14 not. You heard Mr. Scherbing testify. He's a union
15 employee, he's the local chairman, and he said that BNSF
16 takes away employees' access when such investigations are
17 pending. He wasn't referring to just Mr. Sanders. He
18 understood that that was part of the process.

19 No waiver. You're going to hear about the fact
20 that Mr. Sanders supposedly was not offered a waiver.

21 First of all, the waiver, again, is a provision of
22 the Collective Bargaining Agreement. Look at the agreement.
23 It contains a provision in which employees can waive their
24 right. It's their right to a hearing. They can choose to
25 waive that right and agree to discipline. It needs to be

1 signed and agreed to, but it's a provision of the CBA. And
2 it's not true that Mr. Sanders had never been offered a
3 waiver before. He signed two of them. Not in connection
4 with his dismissal, but he still received waivers in the
5 course of his employment.

6 Timing in this case does not support an intent to
7 retaliate. It belies it. Look at Mr. Sanders' prior
8 discipline. The dismissal of Mr. Sanders, which are two
9 separate, independent dismissals, only one of which you as a
10 jury to find in BNSF's favor has to find supportable, but
11 look at his prior discipline. He has multiple prior
12 disciplinary events that are in the record.

13 And there's a principle in the law that where an
14 employee has been disciplined before engaging in protected
15 activity, it negates an inference that the actions that the
16 company took after protected activity was somehow motivated
17 or prompted because of it. Again, it goes to that principle
18 that employees can't immunize themselves from discipline for
19 their misconduct. One of those prior events Mr. Jones was
20 involved in. Those predate the protected activity that
21 Plaintiff relies on.

22 Prior reports. The record also establishes that
23 Mr. Sanders had engaged in protected activity long before
24 the claims of the particular protected activity he's been
25 relying on here in this case. You saw the record Mr. Dane

1 Freshour had collected for the prior two years of
2 complaints. It included a 2013 complaint, it included an
3 unjust treatment allegation, and it included another report
4 to HR. Those long predated the reports that he brought
5 here. And he did not incur any discipline in connection
6 with that protected activity and his employment continued.
7 Those facts negate any inference of retaliatory intent.

8 Consider the timing of the hotline complaint.
9 Mr. Sanders is now held to a hearing on April 3rd. He's
10 concluded one of the two hearings for alleged time theft.
11 He brings it right after that hearing, but before the
12 second. Again, the law does not immunize an employee from
13 discipline.

14 And consider the nature and the length of time
15 that he actually claimed harassment in that hotline
16 complaint. Two years. He claimed that harassment was going
17 on by Mr. Jones, Ms. Hoppenrath, and Mr. Chartier for two
18 years. Well, Ms. Hoppenrath hadn't even been there for two
19 years. She'd only been there for a year.

20 And two years, where were the complaints before?
21 Two years is a long time and were two years alleged in the
22 December complaint or the February complaint? They were
23 not. And how much of that April complaint contained issues
24 and allegations that had already been looked at by HR and
25 reviewed?

1 Plaintiff will also look to various employees. We
2 call them comparators, or you may have heard that phrase
3 used in the last ten days. Your instructions will speak to
4 similarly situated and Plaintiff needing to show for
5 individuals to be similarly situated they must be similar in
6 all material respects without distinguishing factors. There
7 are differences with the employees that Mr. Sanders seeks to
8 rely on.

9 Mr. Kramer, for instance. Yes, he had a coaching
10 and counseling but his allegation, his violation, it was for
11 failing to follow instructions. It wasn't for time theft.
12 Mr. Kramer had another incident where he's alleged not to be
13 honest about track time and authority. Yes, he did take a
14 waiver. He received formal discipline. But again, this
15 goes back to the plaintiff suggests that Mr. Sanders never
16 got a waiver, but we've established and the record shows
17 that isn't in fact the case.

18 Then look at Mr. Klukas, another employee who
19 Mr. Sanders relies on. Ms. Hoppenrath had facts similar and
20 she engaged in the same conduct that she had with
21 Mr. Sanders in the sense that something tipped her off.
22 Something tipped her off as not right about Mr. Klukas and
23 how he reported his time. So what did she do? She
24 conducted an audit. Just like she looked further at
25 Mr. Sanders' activities, she did so with Mr. Klukas. And

1 what happened with Mr. Klukas? Well, just like Mr. Sanders,
2 notified for a hearing under the Collective Bargaining
3 Agreement, removed from service just like Mr. Sanders.

4 A hearing was held. Ms. Hoppenrath, you heard her
5 yesterday speak. She testified at that hearing. The
6 hearing didn't conclude and yes, a waiver was ultimately
7 reached, but you heard Ms. Detlefsen explain this morning
8 that, one, standalone defenses -- standalone defenses may
9 result in dismissal, but each case looks at its facts. But
10 you also heard her explain that at times a post-hearing
11 waiver may be entered into. Maybe there's a procedural
12 defect. Maybe the record just isn't so close, and for risk
13 management or assessing that, a waiver, some form of
14 discipline is at least reached. They are different. They
15 are not the same.

16 By contrast you saw evidence of at least five
17 employees that Ms. Detlefsen spoke to where the PEPA policy
18 was consistently applied as to these five individuals. They
19 all went through the PEPA team that you heard about. The
20 PEPA team's role is to review records solely for purposes of
21 is this dismissal supported, does the record support the
22 violations, and a standalone dismissal, and for each of
23 those individuals that was the case.

24 You heard about an employee with the initials DR.
25 He like Mr. Sanders had been alleged to engage in payroll

1 theft. They conducted surveillance on him too just like
2 Mr. Sanders. He had multiple days of time where he reported
3 additional hours of time not worked. He was removed from
4 service also, just like Mr. Sanders. He had a lot of the
5 same arguments that he raised in his hearing as well, all of
6 which did not carry the day and he was dismissed under a
7 stand-alone defense dismissal. He claimed that the
8 supervisors were out to get him. The other three of the
9 five employees also supported standalone dismissals in those
10 cases.

11 And you will hear me speak shortly about our
12 affirmative defense, and one of the factors of that
13 affirmative defense is has BNSF consistently applied its
14 policy, the PEPA policy and Ms. Detlefsen's testimony, and
15 these standalone dismissals are clear and convincing
16 evidence that that is in fact the case.

17 The investigative hearings. You saw the record
18 that Ms. Hoppenrath went through on each individual hearing.
19 They had the PARS reports indicating the time Mr. Sanders
20 had put in. They had the record evidence of when
21 Mr. Sanders was visually observed when Mr. Sanders had
22 started the hi-rail vehicle, when he had done his
23 inspections, when the hi-rail vehicle was turned off, and
24 personal observations of when he left the property.

25 In the second hearing he admitted that he did not

1 enter his time correctly at that time. The record evidence
2 was clear and irrefutable that the time that he had put in
3 for time was more than the hours he had in fact worked.

4 Mr. Sanders' reasonings that he has come up with
5 and spoke of in the last week, they do not work. Let's go
6 over some of those.

7 He claims, for instance, that edits could be made
8 until payroll was closed. But as the first hearing,
9 Mr. Sanders always claimed that he reported his time
10 correctly, thus the whole issue about being able to make
11 changes before the end of payroll is immaterial. He claimed
12 throughout that he had entered his time correctly for that
13 hearing.

14 And as to the second hearing, take a look at
15 Mr. Sanders' own conduct, which belies the idea that he ever
16 had any intent to change the time that he overreported.
17 March 25th, he enters the time. And he admits he wrote it
18 down wrongly, but he didn't change it on the 26th, 27th,
19 28th, 29th in the morning, in the morning when Mr. Sanders
20 was in the PARS system entering his time for March 26. Yet
21 he didn't change his time for March 25th at that time. He
22 only did it after he received those hearing notices. There
23 was no intent to ever change that time.

24 He wasn't yet paid, another argument Plaintiff has
25 raised, but that's the shoplifting example, right? You get

1 caught on your way out the door having tried to take some
2 piece of property. It's still theft. Theft is theft.
3 Whether he was paid or not is not material.

4 Cut letters. You've heard about cut letters.
5 Mr. Sanders' claim in that regard is misplaced also.
6 Mr. Chartier explained that's a process that comes through
7 the payroll timekeeping system for pay code issues and
8 different matters, not for someone looking to get paid for
9 more hours than they worked.

10 And by the way, all these arguments and all this
11 evidence, they've all been submitted and reviewed. The
12 hearing officer in the hearings that Plaintiff wants to
13 characterize as a monkey court or, you know, whatever, that
14 fails to have proper process, all that evidence was allowed
15 in. The hearing officer gave Mr. Mozinski ever break he
16 asked for. He asked for more time to look at the records.
17 There were a lot of records that Ms. Hoppenrath submitted,
18 but the hearing officer gave him time to review it. All
19 that information has been considered and reviewed.

20 The multilevel review process. I spoke of this at
21 the beginning of my remarks, but it cannot be disregarded if
22 it shows no retaliatory intent and it also establishes our
23 affirmative defense that even if, even if you were to
24 conclude that the plaintiff established his case, BNSF --
25 the verdict should be for the defendant if we've shown by

1 clear and convincing evidence that BNSF would have reached
2 the same decision regardless of that protected activity, and
3 this is a textbook case of that. Why do we know that? The
4 evidence is clear.

5 Look at what Stephanie Detlefsen did. Look at
6 what she said. Her entire job is to review the record
7 independently and all she reviews is the record. She
8 conducts an independent review on the affirmative defense
9 that is evidence that regardless of the protected activity,
10 BNSF would have reached the same decision. And she even
11 said she did not consider Mr. Jones' recommendation. She
12 reviews the record. She doesn't rely on the recommendation.

13 Look at what Terry Morgan had said in review of
14 the HR review. He told her look at the review. Look at the
15 facts of the record of the formal hearing. What does that
16 mean? It means the same decision defense. It means set any
17 protected activity aside and review the facts of the record
18 of the misconduct on its own, separate and apart from that,
19 and that's what Mr. Morgan told Ms. Detlefsen to do. That
20 is a textbook case of the affirmative defense.

21 Look at the anti-retaliation process that was
22 activated. Mr. Jones, he ensured that it went up the chain.
23 He sent the record for review to PEPA and his letter advised
24 him: If you do look to engage -- have to assess discipline
25 or look at that, you have to have it reviewed above you and

1 independently, and he did that. Dave Freshour, he conducted
2 an independent review through the hotline complaint. Law
3 looked at it.

4 You have the hearing record that shows
5 Ms. Hoppenrath, her observations along with the GPS track
6 time and authority, and Mr. Sanders got an appeal of that,
7 also another independent review, and you have the PEPA
8 review with the dismissals that I spoke of. All of that
9 evidence together provides clear and convincing evidence
10 that regardless of the protected activity the same decision
11 would have been reached.

12 Also consider this: Consider back on March 18th
13 when Ms. Hoppenrath was looking, and the day occurred and
14 Mr. Sanders had left early and she wanted to observe
15 Mr. Sanders. She went and spoke with Mr. Jones. She
16 observed on the 19th and after she went back and spoke with
17 Mr. Jones about her observations. What did Mr. Jones do?
18 Look at his actions. Where did he send her? He sent her to
19 labor relations for consultation on what to do next. He
20 made sure labor relations was involved to ensure the issues
21 were being reviewed from that department. Is that evidence
22 of an attempt to retaliate? Absolutely not.

23 And five months. If Ms. Hoppenrath and Mr. Jones
24 were so intent on looking to retaliate against Mr. Sanders,
25 why didn't they act sooner? I mean, there was Union Yard.

1 That was Mr. Sanders' responsibility to inspect the yard.
2 He let that yard go out of frequency compliance. They could
3 have disciplined there. They could have disciplined much
4 sooner. They did not. And Mr. Jones' actions in ensuring
5 that additional and other people were reviewing the matters
6 belies any intent that he sought to retaliate against
7 Mr. Sanders in this case.

8 Mr. Sanders did not incur any discipline in
9 connection with the call to FRA or any other protected
10 activity. And when he engaged in protected activity years
11 earlier, he continued his employment, even when he was
12 reporting to Mr. Jones.

13 You will receive when you go back for your
14 deliberations a special verdict form. You'll have various
15 questions on there for you, the first question asking you if
16 Mr. Donald Sanders has proven by a greater weight of the
17 evidence all elements of his claim, and you'll look at
18 Instruction 13 for that. We submit that you answer that
19 that question no, because he has not proven that the actions
20 that were taken were done for intentional retaliation. We
21 are talking about separate and independent unrelated events,
22 protected activity and his unrelated intervening conduct in
23 his engagement of the time theft.

24 But even if you were to answer that question yes,
25 you will then be asked: "Did Defendant BNSF prove its

1 affirmative defense by clear and convincing evidence as
2 [stated] in Instruction 19?"

3 And as I went through all the evidence that
4 establishes that, yes, indeed. When you think of the
5 multilevel reviews and independent reviews that have been
6 conducted as to Mr. Sanders' dismissal, you look at the
7 other standalone dismissals that have occurred, you look at
8 the hearing records that were established, even just one of
9 the dismissals is sufficient to find that his dismissal was
10 proper.

11 You will be given an instruction about the
12 business judgment rule. It is not enough, Ladies and
13 Gentlemen of the Jury, it is not enough for Mr. Sanders to
14 show that -- to merely establish that BNSF's actions were
15 unwise, unreasonable, or unfair. That's not enough. And
16 here you clearly have enough evidence in the record. And
17 when you consider all the additional reviews that were
18 conducted, all of whom reached the same conclusion, that the
19 time theft had occurred, you cannot find in favor of the
20 plaintiff.

21 I will just conclude very briefly with a brief
22 discussion of damages.

23 We have proven, we believe, BNSF has proven, that
24 it has not violated the FRSA, but if you were to reach the
25 damages portion, we would say that there are no damages

1 permitted or that have been proven.

2 I would note that Mr. Sanders himself has fully
3 mitigated his wage loss, as he stated, that he's making more
4 or at least as much in the last few years through other
5 employment, and any other employment that he received would
6 have to be subtracted from any backpay loss. There's no
7 evidence of benefits losses.

8 And on the emotional distress, you need actual,
9 tangible, credible evidence. There's no evidence of
10 receipts for mental health treatment. He has admitted he
11 has not sought formal mental treatment. He hasn't received
12 a diagnosis. He has received prescriptions, but not taking
13 them. There is not sufficient evidence of any emotional
14 distress damages, but even if you were to find any, they
15 should be minimal.

16 Thank you so much for your time and patience and
17 attention over the last few weeks. We ask that you find in
18 favor of BNSF and find against the plaintiff to the first
19 question and/or answer yes, that BNSF has met its
20 affirmative defense in the second question.

21 Thank you.

22 THE COURT: Members of the Jury, we'll take a
23 five-minute recess at this point to allow Counsel to set up.
24 We will resume proceedings at five minutes to 2:00 p.m.

25 (Recess taken at 1:50 p.m.)

* * * *

(1:57 p.m.)

IN OPEN COURT

(Jury enters)

THE COURT: Please be seated, everyone.

Mr. Kaster?

MR. LUCAS KASTER: Thank you, Your Honor.

PLAINTIFF'S CLOSING ARGUMENT

MR. LUCAS KASTER: Ladies and Gentlemen of the
Jury, Counsel:

Do the right thing. It's a phrase we've all heard
our entire lives. Our parents said it to us when we were
growing up. My parents taught it to me. It's a phrase that
we tell our children when we raise them. Do the right
thing, even when it's hard, even when it's unpopular. Do
the right thing.

And that's what Don Sanders did. He followed the
law, he followed BNSF's internal rules, and he made sure
everyone around him was safe. And he did it even when it
was hard, even when it was unpopular. You heard on one of
the recordings Mr. Sanders saying, "I don't care if people
laugh at me. If I can save one life, that's what I care
about." Do the right thing.

You know, that phrase reminds me of a movie called
A Few Good Men. It's one of those lawyer movies. I'm a big

1 fan. A lot of lawyers don't like legal movies, but I like
2 it. My wife gives me a hard time because I watch the same
3 movies over and over and over again. And that movie is
4 famous for Jack Nicholson's line at the end about, "You
5 can't handle the truth."

6 But there's an earlier scene in that movie that
7 exemplifies what's going on here. And there's two lawyers.
8 There's Kevin Pollak, who's one of the three lawyers, along
9 with Demi Moore and Tom Cruise.

10 And Demi Moore is walking out of the courtroom and
11 Kevin Pollak's character turns to her and he says, "Why do
12 you like them so much?" And she turns around,
13 straight-faced, and looks him dead in the eye and says,
14 "Because they stand on a wall and they say, 'Nothing's going
15 to hurt you tonight, not on my watch.'"

16 And that's what Don Sanders did. When he went to
17 work, he said, "Nothing's going to hurt anybody around me
18 tonight, not on my watch, not today." It didn't matter how
19 many times he was screamed at, or yelled at, or sworn at by
20 Mr. Jones, or how many times his schedule was changed, or
21 how many times his work conditions changed. He wasn't going
22 to give up, because if he could save one life, that's what
23 mattered to him. "Not on my watch, not today."

24 And you heard at one point in the recordings
25 Mr. Sanders asked Mr. Jones, "How many derailments have

1 occurred while I've been track inspector in Dayton's Bluff?"
2 And Mr. Jones says in response, "I know. I can't replace
3 you." Because he made sure that everyone was safe, because
4 he had seen what happens when corners are cut, when safety
5 is no longer the top priority. He saw in realtime in his
6 job the consequences: the derailments, people being killed,
7 and he wanted to make sure that never happened on his watch.

8 I want to show you an exhibit. We've looked at it
9 several times during the trial, but I want to look at it a
10 little bit differently right now.

11 This was the email that we have seen where
12 Mr. Sanders sends his boss a nightly report saying, "I went
13 to HR." It's the email that Mr. Jones responds to at 3:34
14 in the morning. But written right above where he goes to
15 HR, he talks about being called out for a body. Someone had
16 died that day. And who got the call? Don Sanders. And who
17 showed up? Don Sanders. And who made sure that everyone
18 was safe? Don Sanders.

19 And when Mr. Jones responds, he doesn't say
20 anything about the fact that somebody just died on his
21 railroad. What his concern is, is "Don Sanders went to HR
22 and is reporting me." That's his concern, not that somebody
23 died on BNSF property.

24 Mr. Sanders refused to give in. He stood his
25 ground. He made sure everyone around him was safe. He

1 refused to let a train pass over a section of track, trains
2 that can be a mile long going 79 miles an hour, if he didn't
3 think it was safe. If the federal regulations and BNSF's
4 internal rules said it wasn't safe, he wasn't going to let
5 it happen. "Not on my watch, not tonight."

6 So let's back up a little bit, kind of give you a
7 full view of the case.

8 You've heard Mr. Sanders started with BNSF in
9 2007, and after a few years he became a track inspector in
10 2010. And initially he was -- when he came to Dayton's
11 Bluff he was mainly focused on the yard inspections and
12 you're inside of an enclosed area. And as Mr. Jones and
13 other witnesses acknowledged, when you're doing track
14 inspections in the yard you're not entering slow orders,
15 because the max speed in a yard is ten miles an hour.
16 There's no reason to enter a slow order, because ten miles
17 an hour is the slowest slow order you can enter. So it's a
18 less pressure position because you're not slowing trains
19 down. You're not telling the company, "I'm prioritizing
20 safety over your ability to make money." He just has to
21 report the defects. And for the most part we looked at his
22 reviews. There was no real issues. He performed his job
23 and continued to work with BNSF as a track inspector in
24 Dayton's Bluff.

25 But then 2015 comes around, and though Mr. Sanders

1 is the yard inspector, the mainline inspector has now left
2 Dayton's Bluff, and so he's being asked by Mr. Jones and
3 Ms. Hoppenrath to do both, come out of the yard and do the
4 mainline inspections. Go out and do inspections on the
5 sections of track where we're moving freight. And he
6 continues doing the same job he's done for the last couple
7 years. When there's a defect, he enters it. When it
8 requires a slow order, he enters it.

9 And in 2015 he works 311 days, and out of those
10 311 days he works 300 days of overtime. Counsel
11 referenced -- she said, "It's like batting a thousand."
12 Three hundred days of overtime and they're accusing him --
13 and let me make this clear. They're saying he's
14 individually terminated, which means on March 19th he's
15 being terminated for two and a half hours that they claim he
16 stole. The evidence suggest he didn't steal anything. Two
17 and a half hours out of 300 days of overtime.

18 And then we look at the bottom, the last part,
19 because on their pay records they indicate when days are
20 supposed to be rest days, when Mr. Sanders should be home
21 with his family enjoying anniversary dinners or going to
22 kids' sports games.

23 A hundred and 46 rest days in total. And how many
24 of those days did Mr. Sanders come to work or was asked to
25 come to work? A hundred and eight. A hundred and eight

1 days when he was supposed to be off he came in, he showed
2 up, because he said, "Not on my watch, not today," and they
3 were asking him to do that.

4 He didn't show up on his own. He didn't just
5 decide when he woke up in the morning when he wasn't
6 scheduled, "You know what? I feel like going to work today,
7 so I'm just going to randomly show up." That's what they
8 want you to believe. A hundred days? And they claim he
9 just made the decision on his own. They knew exactly what
10 he was doing because they were asking him to do it.
11 Otherwise, he wouldn't have been there. He wasn't scheduled
12 to be there. They were asking him to work. They were
13 requiring him to work. That's why he showed up.

14 And when he's working that much and he was
15 entering slow orders on the mainline, he's now taking trains
16 that are moving from here to Chicago and delivering freight
17 that has BNSF has admitted they put on a schedule. And
18 they're paid based upon how trains arrive on schedule, which
19 means the more they're delayed, the less money they earn.
20 And so he can take a train down from 79 miles an hour to ten
21 miles an hour when the regulations require it, and when he
22 did that, Mr. Jones yelled at him, swore at him, threatened
23 him, and when that didn't work he spied on him and accused
24 him of time theft and ultimately got rid of him.

25 And we see in the evidence that it's more than

1 just slowing freight down, that BNSF also rates and pays its
2 employees based upon slow orders. You heard from
3 Mr. Shearer this morning that the scorecard specifically
4 lists corridor slow order minutes, and they have a scorecard
5 for the highest person in the maintenance department all the
6 way down to local roadmasters. They have an entire team
7 dedicated to it at BNSF, it's always accessible on their
8 intranet, and it ranks all of their employees by position
9 from one to whatever the number is, and employees can go on
10 in realtime and see where they rank.

11 Those rankings and scorecards then factor into
12 their performance reviews. We saw that in Mr. Jones'
13 reviews by Mr. Jensen and Mr. Rindy. They're specifically
14 looking at these metrics and the rankings to determine how
15 people are performing, and one of those specific metrics are
16 corridor slow order minutes. So the more times Mr. Sanders
17 enters a slow order, the lower the managers' scorecards, the
18 lower their scorecard ranking, the lower their review. And
19 guess what? Their review grade impacts their bonus. And it
20 impacts it two ways when you enter a slow order, because
21 there are two bonuses.

22 I read a section of deposition testimony from the
23 corporate witness about BNSF's incentive compensation plan,
24 and that witness says that there's an overall company bonus
25 that is based upon overall company performance, and one of

1 the three main metrics in that overall company performance
2 is velocity, how trains move from point A to point B and
3 whether they're on time. So his job impacts overall company
4 performance.

5 And then there's a kicker for bonuses. That's
6 impacted by individual performance. And so if somebody gets
7 a higher grade on their annual performance review, they get
8 an additional kicker of their bonus. And so Mr. Jones and
9 his counterparts are incentivized by BNSF's own policies and
10 practices to dissuade Mr. Sanders and other employees like
11 him from reporting defects and entering slow orders, because
12 it impacts their pay.

13 So what happens? In 2015, Mr. Sanders starts
14 working almost every day of the year and is now being asked
15 to do multiple jobs. And I'm going to show you some of the
16 text from the recordings. And Counsel's right about one
17 thing. It makes you cringe. It's offensive. It has no
18 place in a work environment or outside of a work
19 environment.

20 And Counsel made reference to the fact that there
21 were 70-some recordings. I think the record reflects there
22 was 40-some. They were all given to Counsel. They could
23 have played them for you. They chose not to. And why?
24 Because they support Don Sanders. That's why.

25 This is what the recordings show. On

1 November 9th, Mr. Sanders gets a call from Mr. Jones because
2 he has just entered a slow order on a section of track. And
3 Mr. Jones' response to Mr. Sanders doing his job and
4 entering a slow order is:

5 "I got fucking people coming in from all over the
6 place that are double-checking how I manage the railroad.
7 And they're almost wanting to take me off this fucking job
8 and put me on another one. So I'm about to lose my job, my
9 family's welfare, because I can't get a team of people who
10 want to work with me."

11 Work with him how? The rules and regulations are
12 clear. If it's a defect, it's reported. If it requires a
13 slow order, it's put on immediately. Mr. Jones even
14 admitted that. I asked him, "Is there ever a time you
15 should not report a defect?" "No." "Ever a time you should
16 delay reporting a defect?" "No." "Ever a time you should
17 delay putting on a slow order?" "No."

18 Then he says:

19 "But I guess -- I guess you gotta do what you
20 gotta do, but I guess I'll just fucking pack my bags and
21 tell my family, 'Fuck it.' I'll just go back."

22 He's threatening Mr. Sanders, that if Mr. Sanders
23 doesn't comply, he's going to lose his job because of the
24 pressure his managers are putting on him about slow orders.
25 This case isn't about Mr. Jones. This case is about BNSF's

1 entire company and the pressure they put on managers like
2 Mr. Jones to stop people from doing what the law requires.
3 That's what this case is about.

4 Later in that call there's a reference to the EI,
5 the Engineering Instructions, the rules that require and
6 dictate to Mr. Sanders what he can and cannot do.
7 Mr. Jones' statement? "Okay. We know what the EI says,
8 that there's critical joints at a location. You know what?
9 Big fuckin' deal." If that's not an indication that
10 Mr. Sanders shouldn't follow the rules, I don't know what
11 is.

12 The next day -- oh, by the way, this is the defect
13 they were talking about on that call on November 9th.
14 Remember I showed you the nightly report with the email
15 Mr. Sanders sent to Mr. Jones attaching this picture, and
16 then Mr. Jones calls Mr. Sanders. This isn't, you know, a
17 minor chip in the rail. This is for two-foot long, two-inch
18 thick bolts that aren't just loose. They're out. And he's
19 arguing with Mr. Sanders about whether this is a defect,
20 whether a train a mile long should go 79 miles an hour over
21 this because his bosses won't let up.

22 The next day Mr. Sanders, because he's being asked
23 to do two jobs and doesn't want to be thrown under the bus,
24 asks for something in writing and you heard it on the call.
25 "Boss, I'll do whatever you want me to do. I just would

1 like something in writing in case something happens." And
2 Mr. Jones' immediate response is, "That would be like me
3 asking you to never enter another slow order out here."
4 It's nothing like that. Mr. Sanders is doing his job. He's
5 doing what the law, the rules -- their rules require. And
6 he's doing something his bosses are asking him to do and
7 he's just asking for some writing confirming that, and they
8 refuse.

9 And then at the end Mr. Jones says this: "Don't
10 be worried. We're not coming to get you." And four months
11 later they do exactly that. The person who's telling
12 Mr. Sanders, "Don't be worried" does exactly that.

13 November 23rd there's a call with the FRA.
14 Mr. Sanders says: "I don't know what's going on. Why am I
15 always being criticized for what I'm doing out here? I'm
16 just trying to do my job." Mr. Jones' response: "You're
17 damn right you do, because you all the time have a way that
18 you want to go about stuff and it never includes me until
19 it's to your benefit. Why in the world would we ever call
20 FRA about anything?"

21 This isn't about Mr. Sanders contacting Mr. Jones
22 before he goes to the FRA. That's not what this is about.
23 Because then he says: "The maddest I've ever been in my
24 life is when I found out you and other people were providing
25 information to Mr. Mozinski and there was a threat about

1 contacting the FRA." The maddest he's ever been in his
2 life. That's what Mr. Jones said.

3 By the way, Counsel represented that Mr. Sanders
4 admitted that the FRA doesn't regulate wrap bars.
5 Mr. Sanders never said that. He said there was a directive
6 from his bosses about wrap bars and he was confused, and who
7 better to reach out than the people in charge of putting out
8 the regulations. "I've been working with them my whole
9 career. It's never been an issue. Why is it now?" And he
10 admits after talking with the FRA, Mr. Jones was right.
11 There's no reason to not contact the FRA. To Mr. Sanders
12 their objective is the same, to keep people safe.

13 November 30th, another call about a slow order
14 after Mr. Sanders has entered one. Jones' response: "This
15 is where I need your help. This right here, in the middle
16 of peak season, it's just -- and I know it's not your
17 fault -- you don't have to deal with all the questions."

18 The questions from who? If BNSF is so worried
19 about safety, why are there questions about slow orders? If
20 safety is number one, people should be standing up and
21 cheering him. "Why are there questions every time a slow
22 order is entered? You got to understand, this is just
23 making me look like an idiot. I just hate leaving a ten out
24 on peak season. That's not good. I don't want to be the
25 work group that causes us to fail on peak.

1 Incentives, peak, slow orders impact that and
2 that's what Mr. Jones is saying: I don't want to have our
3 group be responsible, so stop entering slow orders.

4 December 3rd, again there's a call about a slow
5 order that Mr. Sanders put on, and this time Mr. Jones just
6 goes off. He's mad at Mr. Sanders. He's mad at welders.
7 And what he says about a Mr. Kramer is that he's "going to
8 make him weld until he fucking falls over." That's a direct
9 threat to the health and safety of another employee. And
10 you know what BNSF does about it? Nothing. Because the
11 letter that he gets references calls in November, one call,
12 not this one. They never talked to Mr. Kramer. They never
13 make sure he's okay. And you heard in Ms. Eggertsen's depo
14 that was read, I asked her during her deposition: "Does
15 this concern you at all?" And her response was this: "If
16 Mr. Kramer was actually in a position to fall over, then I
17 would be concerned." That's the extent to which this
18 company will go to protect its managers. They'll deny a
19 direct threat.

20 You know, Mr. Jones has said in this case and he
21 said it in his testimony that he wasn't trying to dissuade
22 Mr. Sanders from reporting defects or entering slow orders.
23 Then what was he trying to do? Did he provide any
24 explanation? Anything. What's the reason for the swearing,
25 or the yelling, or the threats, or, "I'm going to lose my

1 job?" There was no explanation. The only thing he could
2 say is, "I just wanted him to be a team player, to work with
3 me."

4 You know, I like books and recently I've been
5 listening to a lot of audio books, and there's one by an
6 organizational psychologist named Simon Sinek. He's got a
7 very famous TED Talk. But he's got a new book called *The*
8 *Infinite Game*. In one of the chapters he talks about a
9 concept called ethical fading and how people, in particular
10 businesses, large groups of people, a culture, starts to
11 slowly, incrementally, ethically fade into conduct we would
12 all agree is unethical and unlawful.

13 And one of the things he talks about is the use of
14 euphemisms, the changing of language. Companies don't talk
15 about spying on customers or on social media or Facebook.
16 They don't spy on customers. What do they do? They data
17 mine, or they provide services to customers. It's the
18 slight changing of language to make something that we feel
19 is unethical approachable. It's a form of self-deception.

20 And what Mr. Sinek talks about is that in
21 companies that engage in this behavior, it happens slowly
22 over time. There are these small incremental moments. And
23 he references the Wells Fargo scandal and how there had been
24 internal people who raised concerns within the company who
25 said, "I can't meet these objectives that you're setting out

1 for me unless I do something that is unethical." And what
2 did they get back from their managers? Perform or you're
3 gone. Sound familiar? And that slow, incremental, ethical
4 fading resulted in Wells Fargo employees opening thousands
5 of bank accounts without customers knowing. And then the
6 CEO stands up in front of Congress and says: "I apologize.
7 That's not our culture. That's not what we believe in."
8 And I say in response I beg to differ. That's exactly what
9 your culture is.

10 This isn't a culture about team playing or getting
11 along or contacting me first. That's not what this is
12 about. It's about performance and that's it. Meet your
13 objectives or you're out. Perform on your scorecard or
14 fucking pack your bags. He's saying it. He's admitting it.
15 We don't have to guess about what's happening in this case,
16 because we can all hear it.

17 He's telling you: "My bosses are pressuring me to
18 perform." Not to put safety number one, to perform.

19 So what does Mr. Sanders do? He does what any
20 reasonable person would do, what their policies request and
21 require and ask employees to do. Go to HR, bring this up.
22 Tell us. Just like Wells Fargo's policies said: Tell us.
23 Do they listen to him? Once, ever? He goes to HR three
24 separate times: December 7th, February 24th, and April 5th,
25 and each time he's told your allegations are

1 unsubstantiated.

2 And they want to talk about a link between the
3 two, and we'll talk a little bit more about this here in a
4 minute, a link between the two things. Well, there's no
5 connection between Mr. Sanders' HR complaints and the
6 ultimate discipline. The exact same person who is the
7 subject of the complaints, who is on the recordings, is now
8 charging Mr. Sanders with discipline. This isn't rocket
9 science. This isn't doing some -- you know, a hundred-page
10 internal investigation about what happened. It's looking at
11 a face of a document and saying the exact same person is
12 involved. This is easy. And they ignore it each and every
13 time.

14 And then there's (indicating) this. This is the
15 upper half of that email we looked at a minute ago where at
16 3:56 a.m. the day that Mr. Sanders goes to HR when he's
17 called out for a dead body, Mr. Jones responds without
18 knowing why Mr. Sanders went to HR and tries to counter what
19 he thinks Mr. Sanders went to HR for. I would call this a
20 Freudian slip. He knows exactly what's going on. He
21 doesn't need to guess, because he knows what he's done.

22 So what did Mr. Jones do? With Ms. Hoppenrath in
23 tow, he changes Mr. Sanders' days of work, his start time,
24 his start location, his vehicle. He sends him home. He has
25 other people do his job. Suddenly all these things that

1 Mr. Sanders had been doing for several years without anybody
2 saying a peep are an issue in rapid, consecutive fashion.

3 BNSF also claims that nobody else was allowed to
4 drive a vehicle. Where are these people they're talking
5 about? Where are all these employees they say don't get to
6 drive vehicles home? Did they call a single one? They're
7 their employees. They have control over them. A single
8 one, a single track inspector who says, "I don't get to
9 drive a vehicle home." Not one.

10 And when none of that works and Mr. Sanders
11 continues to do what the rules and regulations require, they
12 step up their game. Mr. Sanders goes to Northtown for a
13 couple months and comes back on March 15th, and by March
14 19th they're following him around in an unmarked car and
15 accusing him of time theft before payroll has ever closed.

16 They issued two separate investigations, two
17 separate charges, they make him go through two separate
18 hearings, and they say it was to find out the facts. No, it
19 wasn't. They had their mark. They knew exactly what they
20 were doing. And that's why they issued two separate notices
21 of investigation and two separate charges, because they
22 wanted to be sure. They wanted to leave no doubt, because
23 they knew, as Ms. Detlefsen said, that it could eventually
24 be overturned by an arbitrator. And so they don't want to
25 put it all in one. They don't want to take that chance.

1 They need to double down. They need to make sure. And
2 that's why Mr. Jones issued two separate notices when he had
3 never done that before, at least we didn't see any evidence
4 of him doing that before, because they wanted to be sure.

5 And they can't even get their story straight about
6 why they started to follow Mr. Sanders. They said
7 initially, Mr. Jones said and Ms. Hoppenrath said, well, it
8 started on the 18th. "Mr. Sanders left 15 minutes early,
9 and so I decided the next day because of that that I'm going
10 to use an unmarked vehicle and follow him around, 15
11 minutes."

12 And then we heard deposition testimony from
13 Mr. Jensen, who gave a vastly different story. Mr. Jensen
14 is Mr. Jones' boss, and Mr. Jensen says, "No, we've been
15 talking about it for a long time. Mr. Sanders is in the top
16 ten of earners and we had been talking about surveilling him
17 for several months. Vastly different stories. They can't
18 even get that story straight.

19 And then they say he's terminated separately for
20 March 19th and March 25th and 26th. So let's look at
21 March 19th.

22 The evidence demonstrates that Mr. Sanders worked
23 eight hours that day. They may not like the evidence, but
24 that's what the evidence demonstrates. It also demonstrates
25 that Ms. Hoppenrath's testimony is not possible. She

1 testifies in the hearing that Mr. Sanders got back to the
2 shack at Dayton's Bluff at 13:15, 1:15 p.m. This is the
3 vehicle record. As of 1:48, Mr. Sanders is going 55 miles
4 an hour and he's going on the freeway this (indicating)
5 whole time. There's no possible way according to the
6 records he's back at the shack at 1:15, and not a single
7 person acknowledges that or even looked at it. They're
8 deciding somebody's job and livelihood and they can't even
9 pick out this fact.

10 March 25th and 26th. They gave him a notice
11 that's dated March 28th, 2016, and as of the date of that
12 notice, Mr. Sanders hasn't even entered time for the 26th.
13 It's undisputed that he doesn't enter time until the 29th.
14 They're already talking about charging him with a violation
15 when they don't even know what time he's reported and
16 payroll hadn't even closed yet. And Mr. Sanders had said in
17 the investigation: "I intended to go back and change my
18 time. I put them in as place holders." And they shut him
19 off. They didn't care. They didn't let him change it.

20 And you saw the emails by Ms. Hoppenrath and
21 Mr. Jones where they were urging ASAP, we need it right
22 away. We don't want to give him opportunity to correct his
23 time.

24 And I want to reference this because it's in the
25 investigation. Counsel referenced the GPS coordinates.

1 Mr. Sanders and his union rep put in the GPS coordinates and
2 Counsel kept referencing the fact that it didn't show him at
3 Bridal Veil. The records demonstrate according to the GPS
4 coordinates that he was at 1500 Warner from 6:19 to 8:21.
5 That's Dayton's Bluff. They didn't tell you that. They
6 don't tell you that that's what the records show. He's
7 working. They ignore it.

8 He sends an email at 2:27 on the 19th, so he shows
9 up at 6:30 and works till 2:30 on the 19th.

10 And then the 25th and 26th. And I'm showing you
11 this because we didn't really look at it, but you heard
12 testimony from Mr. Sanders that he intended to go back and
13 needed help with a pay code for lunch, because it was a
14 holiday weekend and he needed some help understanding it.
15 This was in the transcript submitted by Mr. Sanders and his
16 union rep from a Mr. Setnar, who said, "I intended to help
17 Mr. Sanders correct his time to make sure it was accurate
18 and use the right pay codes." They ignore that.

19 You heard from Mr. Mozinski, who testified that he
20 had never seen someone charged before payroll closed, ever.
21 This was the first time. And that's unrebutted evidence.
22 They've given you nothing to indicate that that's not true.
23 And even more than that, they then decide to pay him for the
24 hours they claim were incorrect. They stuck the money in
25 his pocket as he walked out the door and then claimed he

1 robbed the bank. They're saying the hours are wrong, but
2 they paid him for it and it required Ms. Hoppenrath's
3 sign-off. They were trying to make sure. That's what this
4 is about.

5 And in total, the separate investigations, the
6 total time that they're claiming that Mr. Sanders reported
7 over 311 days of work is six hours and 45 minutes, total.
8 Counsel made reference to it being all overtime. It was
9 all overtime because March 25th was a holiday. It was Good
10 Friday. And when you work on a holiday, all of your time
11 is overtime pay per the union contract. It wasn't that he
12 was claiming it was all overtime pay when it shouldn't have
13 been. It's what the union contract requires. And it was
14 Good Friday and he was working and other people are at home
15 with their families.

16 And then it's separated, so it's two and a half
17 hours for March 19th and four hours for March 25th and 26th,
18 and they say both of them warrant dismissal.

19 But you look at comparators: Mr. Klukas,
20 Mr. Kramer, Mr. Johnson, Exhibits 218, 222 and 223. All
21 employees under Mr. Jones's direction, all around the same
22 period of time, all accused of dishonesty and misreporting
23 time. And Mr. Johnson's allegation is specifically payroll
24 theft. None of them are terminated. They're all given a
25 waiver by Mr. Jones. And I asked him: Had any of those

1 people filed an HR complaint against you? No. And by the
2 way none of them were track inspectors.

3 When you also look at the documents, each of those
4 people were charged with allegations on multiple days, yet
5 they got one investigation, not multiple like Mr. Sanders.
6 That's an indication of retaliation, a retaliatory motive,
7 together with the screaming and yelling and swearing
8 directly related to his protected conduct. That's motive to
9 retaliate when you see different people who are treated
10 differently despite having similar conduct. That's motive.

11 Now, BNSF brought up some comparators that
12 Ms. Detlefsen talked about and you can look at them.
13 They're from Iowa, they're from South Dakota, they're
14 from -- it's one manager who was accused of using a credit
15 card to buy meals at a restaurant. Don't look at actual
16 people under Mr. Jones' direction. Look over (indicating)
17 here, look over here, look over here (indicating). It's one
18 distraction after the next. Did they even bring up the
19 three comparators who are under his direction? Did
20 Ms. Detlefsen even look at them or ask him? No. They just
21 want to present to you information from all around the
22 country.

23 And then let's talk about the time entry issue.
24 Did BNSF call a single witness to talk to you about how
25 employees put in time? Zero, not a single one. We brought

1 in four separate employees who all talked about the custom
2 and practice of putting in place holders and it would be
3 edited, especially for people in Mr. Sanders' position who
4 was called out in the middle of the night at all times, that
5 there were constant adjustments before payroll was closed.
6 Not a single witness, and it's more than that. Not a single
7 question to their witnesses about how employees typically
8 put in time, because they know how it works and it works
9 just like our witnesses said.

10 And then let's talk about these administrative
11 decisions, the OSHA determination, the NRAB decision. It's
12 undisputed. Those decisions are based on no live testimony.
13 None of -- most of the records you saw were never included
14 in those investigations. There are no recordings. They
15 never had the documents you have seen. There's no evidence
16 of the scorecards. Mr. Jones never testified.
17 Distractions. Don't look at the evidence in this case.
18 Don't look at what you heard and saw live with your own eyes
19 and ears. Look at a piece of paper from some person who
20 made a decision hundreds of thousands of miles away.

21 And did they even ask witnesses to describe what
22 those decisions were based upon, what information those
23 people had at the time? Not a single question, because they
24 don't want you to know. Because what it demonstrates is
25 they don't have the information we have. This is the very

1 first time in five years that Mr. Sanders has a hearing like
2 this where all of the evidence comes out, where people are
3 sworn and put under oath on a witness stand and asked
4 questions, the very first time. They don't want to talk
5 about that. They want to talk about distractions. Look
6 over (indicating) here, look over (indicating) here, look
7 over (indicating) here.

8 Look at the evidence. That's all we ask. Take
9 into account what you heard and saw in this courtroom.
10 That's what we're asking.

11 And then let's talk about this link. I was asking
12 Mr. Freshour yesterday and he kept saying, "I kept looking
13 for a link, a connection between the two things, and I
14 couldn't find anything. You know, I did an investigation.
15 I couldn't find anything."

16 And that link is what's called a contributing
17 factor and you'll see that in the jury instructions. It's
18 saying that BNSF and Mr. Jones took action in part by
19 his -- because of his protected conduct that at least played
20 some part in the decision. And his protected conduct is the
21 safety complaints, the defects, the slow orders, the HR
22 complaints, the call with FRA.

23 And like I said before, this isn't a hard case to
24 figure out the link, because the same person who's the
25 subject of the complaints and who's on the recordings

1 yelling and screaming at Mr. Sanders is the same person who
2 charged him and recommended he be terminated. This isn't a
3 hard case to find a link. But again, that's the links BNSF
4 will go to. The head HR person over this entire region will
5 stand up here under oath and claim, "I don't see a
6 connection. What do you mean? That doesn't concern me at
7 all."

8 There's also a part about knowledge. In a basic
9 form these are the elements of an FRSA claim: protected
10 conduct, those safety concerns, the defects, the slow
11 orders, knowledge. The people who are making the
12 determination know about his protected conduct. And adverse
13 action, there's no dispute about that. He clearly was
14 terminated. And contributing factor, that there's a
15 connection between the two. And really the knowledge
16 element and the contributing factor are the issues.

17 So let's talk about knowledge. Obviously,
18 Mr. Jones knew about everything that Mr. Sanders did, as did
19 Ms. Hoppenrath. Counsel represented that Ms. Hoppenrath
20 didn't know about the HR complaints. She's the one who set
21 up the meeting with Ms. Eggertsen. You saw that in an
22 email. It's Exhibit 39. You can look at it. It's
23 Ms. Eggertsen's summary. She specifically says she reached
24 out to Ms. Hoppenrath about setting up a meeting with
25 Mr. Sanders. She knows that day. He knew about it at

1 3:57 a.m.

2 We saw the email in April, the HR hotline
3 complaint that goes all the way up to Mr. Freshour's boss in
4 Fort Worth, including the law department, other individuals
5 in corporate headquarters. Doug Jensen knew about it that
6 day. Ms. Detlefsen agreed she knew about it at the time she
7 made the determination. Every single person knew about his
8 complaints. There's really no dispute about it.

9 And then there's that connection. An animus or
10 anger is one of the key factors, is there any anger around
11 Mr. Sanders' protected conduct. And I'm not going to go
12 over all of the recordings again, because it's clear. There
13 is clear anger and frustration around what Mr. Sanders is
14 doing.

15 And then there's temporal proximity or timing, and
16 you'll get an instruction that that alone by itself isn't
17 enough, and that's right, but timing is still an issue. If
18 one things short in time after the first, you can use that
19 to establish a connection between the two, and here there's
20 a mountain of other evidence as we've talked about, but
21 here's the timing:

22 December 7th, the first complaint. December 8th
23 Jones sends the email to HR trying to counter the complaint.
24 December 10th Mr. Sanders' schedule is changed from 5/8s to
25 4/10s. December 11th he's sent home. December 15th he's

1 required to work 24 hours at Union Yard. December 17th his
2 vehicle is taken away. January 6th his start time and
3 location are changed. The second complaint occurs on
4 February 24th after the training that Ms. Eggertsen did.
5 The closure of that complaint occurred on March 22nd. She
6 sends the letter to Mr. Sanders. On March 19th
7 Ms. Hoppenrath spies on Mr. Sanders. On March 25th and 26th
8 they spy again. And on April 19th they recommend his
9 termination. And then on April 5th Mr. Sanders files the
10 hotline complaint and on April 19th Mr. Jones provides a
11 statement to Mr. Freshour. On the exact same day he's
12 sending the email to PEPA recommending termination, the
13 exact same day.

14 Again, it's not hard to make this connection. And
15 you saw when Mr. Freshour was on the stand yesterday I asked
16 him some questions about that and I put those two exhibits
17 up on the board and he hesitated, because he hadn't seen
18 that before and he had never put it together, that the same
19 day Mr. Jones is recommending termination and responding to
20 the HR complaint. And this evidence, what we have to
21 establish is by the greater weight of the evidence, which
22 means we just have to tip the scales 51 percent to establish
23 that connection. It's overwhelmingly established in this
24 case.

25 And when you add on top of that it's a culture of

1 harassment and retaliation. We called multiple employees to
2 talk about that. Matt Scherbing came up here and talked
3 about Mr. Jones -- and again I apologize -- giving what
4 Mr. Jones called a face-down fucking because they entered a
5 slow order. Kevin Gaylor came in and said he filed a
6 complaint with labor relations about the cell phone usage
7 and the next day his manager knew about it and eliminated
8 his job.

9 Labor relations, the department that's supposed to
10 be confidential, the next day Mr. Chartier knew about it.

11 THE COURT: Mr. Kaster, I'm sorry to interrupt. I
12 really am. I just wanted to give you a heads-up. You've
13 got about five minutes left.

14 MR. LUCAS KASTER: Mr. Heyer talks about a Stinson
15 bridge. We saw the recording from Mr. Kramer about welding.
16 And then we heard from Mr. Chartier, his admission that he
17 told employees to get their head out of their ass and run
18 their territory. This is a cultural problem. This isn't
19 Mr. Jones. He's a symptom of a larger problem at this
20 company.

21 So let's talk about the verdict form. This form
22 is the most important thing you'll look at.

23 Under Question (1), did Mr. Sanders prove by a
24 greater weight of the evidence his FRSA claim, we would
25 submit to you the answer to that is yes.

1 And then the affirmative defense, did BNSF prove
2 that they would have made the same decision. The answer to
3 that is no.

4 And here's the central question: If you take
5 Mr. Sanders' protected conduct off the table, if he would
6 have, for example, just gone along with what Mr. Jones
7 wanted, agreed with him, would that decision have been made?
8 Would he have been terminated? The answer to that is no.
9 And we see that with the comparators, because none of those
10 people filed HR complaints and none of them were terminated
11 and none of them were track inspectors.

12 Looks like I jumped ahead on accident. Apologies.

13 So now let's talk about damages. There's economic
14 damages and emotional distress. These are the economic
15 damages scenarios that Mr. Boisso detailed to you. And the
16 scenario on A references his last two years as a track
17 inspector. His mitigating wages, the wages he's earned,
18 Mr. Sanders has earned since then, were subtracted out and
19 that's the difference.

20 And Ms. Grobe or Ms. Grobe admitted that
21 Mr. Sanders' earning capacity at BNSF was \$155,000, almost
22 exactly what Mr. Boisso claimed, and these are his damages.

23 Now let's talk about emotional distress. Three
24 hundred and 11 days, late-night calls, interruption of
25 anniversary dinners, and Mr. Sanders came in even when he

1 maybe should not have. And what does he get in return?

2 Swearing, berating, all of the things we've heard. When he
3 tries to stop it, it just gets worse.

4 And after all of this he's still coming in. He's
5 coming in on Good Friday in March of 2016, doing his job,
6 and how do they repay him for that? By tracking him and
7 following him around for a guy that worked 300 days and 108
8 days of overtime, they spy on him. And he has to go home
9 and tell his daughter that she has to come home from college
10 because her dad lost his job. Not because the plant closed
11 or business shut down, because they accused him of theft.
12 And you heard from Ms. Sanders, who said, "I lost my husband
13 that day." They destroyed him. They took his dignity away
14 from him.

15 It's been five years, eight months and 15 days
16 between when Mr. Sanders was terminated and today, and this
17 is the first time he's getting a hearing.

18 And what's happening at BNSF in the mean time?
19 They're being congratulated for getting rid of Mr. Sanders
20 and they're calling him a lunatic, a lunatic, and the only
21 person who suffers any consequences out of this scenario is
22 Mr. Sanders. So I submit to you that his emotional distress
23 damages are far greater than his economic damages, far
24 greater.

25 And the last thing I would say is this: This is

1 what's really going on in the fall of 2015. This is
2 Mr. Jones' 2015 end-of-the-year review, and there's a
3 comment from Mr. Rindy about a hundred million dollar deal
4 of new business that BNSF has, and the St. Paul sub is key
5 to that. That's what's on the managers' minds, a hundred
6 million dollars, at BNSF, where velocity is number one and
7 profit is king.

8 I ask that you find in favor of Mr. Sanders and
9 award him damages. Thank you.

10 THE COURT: Members of the Jury, we've come to
11 that point in the trial where I am going to give you
12 instructions, and before I begin that I'll describe that
13 process just a little bit for you so you understand what I'm
14 about to do and why we're about to do it.

15 I'm going to invite the law clerk at this time to
16 hand out copies of the instructions and the special verdict
17 form so that each of you has those in front of you as I read
18 these instructions.

19 The instructions that you're being given include
20 not just the instructions that I'm about to read now, but
21 also instructions that I've given to you before and during
22 trial so that you have all of them in one spot.

23 I appreciate that it's probably been awhile since
24 you've held a document and had somebody read it to you, but
25 given the process that we follow here in court, it is not

1 sufficient for me to trust that you will read this on your
2 own. It is vitally important that we get these instructions
3 read to you and recorded on the record so that we all know
4 that we're all quite literally on the same page.

5 So the Instructions 1 through 7 are instructions
6 that have been given to you previously and I am not going to
7 reread those. We will begin with Instruction No. 8, which
8 is at page 13. It's a page that is through a clerical error
9 unmarked. I'll begin there.

10
11 **COURT'S INSTRUCTIONS TO THE JURY**

12 THE COURT: Members of the Jury:

13 The instructions that I gave you at the beginning
14 of the trial and during the trial are still in effect. Now
15 I am going to give you some additional instructions.

16 You have to follow all of my instructions -- the
17 ones I gave you earlier and those I give you now. Do not
18 single out some instructions and ignore others, because they
19 are all important.

20 You will have copies of the instructions I am
21 about to give you now, along with the instructions I gave
22 you after you were selected and sworn in as jurors and any
23 instructions I gave you during trial in the jury room.

24 There are rules you must follow when you go to the
25 jury room to deliberate and return with your verdict.

1 First, you will select a foreperson. That person
2 will preside over your discussions and speak for you here in
3 court.

4 Second, it is your duty, as jurors, to discuss
5 this case with one another in the jury room. You should try
6 to reach agreement, if you can do this without going against
7 what you believe to be the truth, because all jurors have to
8 agree on the verdict.

9 Each of you must come to your own decision, but
10 only after you have considered all the evidence, discussed
11 the evidence fully with your fellow jurors, and listened to
12 the views of your fellow jurors.

13 Do not be afraid to change your mind if the
14 discussion persuades you that you should. But, do not come
15 to a decision just because other jurors think it is right,
16 or just to reach a verdict. Remember you are not for or
17 against any party. You are judges of the facts. Your only
18 job is to study the evidence and decide what is true.

19 Third, if you need to communicate with me during
20 your deliberations, send me a note signed by one or more of
21 you. Give the note to the court security officer and I will
22 answer you as soon as I can, either in writing or here in
23 court. While you are deliberating, do not tell anyone --
24 including me -- how many jurors are voting for any side.

25 Fourth, your verdict has to be based only on the

1 evidence and on the law that I have given to you in my
2 instructions. Nothing I have said or done was meant to
3 suggest what I think your verdict should be. The verdict is
4 entirely up to you.

5 Fifth, the verdict form is your written decision
6 in this case. You will take this form to the jury room, and
7 when you have all agreed on the verdict, your foreperson
8 will fill in the form, sign and date it, and tell the Court
9 security officer that you are ready to return to the
10 courtroom.

11 Finally, after you reach a verdict, please know
12 that you may be called upon to decide an additional question
13 in this case that is not before you at this time.

14 In deciding what the facts are, you may have to
15 decide what testimony you believe and what testimony you do
16 not believe. You may believe all of what a witness said, or
17 only part of it, or none of it.

18 You may consider a witness's intelligence; the
19 opportunity the witness had to see or hear the things
20 testified about; a witness's memory, knowledge, education,
21 and experience; any reasons a witness might have for
22 testifying a certain way; how a witness acted while
23 testifying; whether a witness said something different at
24 another time; whether a witness's testimony sounded
25 reasonable; and whether or to what extent a witness's

1 testimony is consistent with other evidence you believe.

2 In deciding whether to believe a witness, remember
3 that people sometimes hear or see things differently and
4 sometimes forget things. You will have to decide whether a
5 contradiction is an innocent misrecollection, or a lapse of
6 memory, or an intentional falsehood. That may depend on
7 whether it has to do with an important fact or only a small
8 detail.

9 You have heard testimony from experts who
10 testified to opinions and the reasons for their opinions.
11 This opinion testimony is allowed because of the education
12 or experience of this witness.

13 You should judge this opinion testimony just as
14 you would any other testimony. You may accept it or reject
15 it and give it the weight as you think it deserves,
16 considering the witness's education and experience, the
17 reasons given for the opinion, and all other evidence in
18 this case.

19 Testimony was presented to you twice in the form
20 of a deposition. A deposition is the recorded answers a
21 witness made under oath to questions asked by lawyers before
22 trial. In a deposition, the witness is placed under oath
23 and swears to tell the truth, and lawyers for each party may
24 ask questions. A court reporter is present and records the
25 questions and answers. Here, to make the deposition

1 testimony somewhat realistic, the party presenting the
2 testimony had an individual play the role of the witness.
3 You should consider the deposition testimony, and judge its
4 credibility, as you would that of any witness who testifies
5 here in person. You should not, however, place any
6 significance on the manner or tone of voice used to read the
7 witness's answers to you.

8 Your verdict must be for Plaintiff Donald Sanders
9 and against Defendant BNSF Railway Company on Plaintiff's
10 claim under the FRSA if all of the following elements have
11 been proved by the greater weight of the evidence:

12 First, Plaintiff Don Sanders in good faith engaged
13 in protected activity by (A) providing information or
14 otherwise directly assisting in any investigation regarding
15 any conduct which Mr. Sanders reasonably believed
16 constituted a violation of any federal law, rule, or
17 regulation relating to railroad safety or security to a
18 person with supervisory authority over Mr. Sanders or such
19 other person who had the authority to investigate, discover,
20 or terminate the violation, (B) refusing to violate or
21 assist in the violation of any federal law, rule, or
22 regulation relating to railroad safety or security, or (C)
23 reporting a hazardous safety or security condition;

24 Second, BNSF fired Mr. Sanders;

25 Third, a BNSF official or officials responsible

1 for firing Mr. Sanders knew or perceived that Mr. Sanders
2 engaged in protected activity; and

3 Fourth, BNSF intentionally retaliated against
4 Mr. Sanders by firing him due, in whole or in part, to
5 Mr. Sanders' protected activity or activities. You may find
6 that the BNSF's firing of Mr. Sanders was due, in whole or
7 in part, to Mr. Sanders' protected activity or activities if
8 it has been proved that BNSF's stated reason for
9 Mr. Sanders' firing is not the real reason but is a pretext
10 to hide retaliation. You may not, however, find that BNSF's
11 firing of Mr. Sanders was due, in whole or in part, to every
12 single one of the track defects he reported or every single
13 one of the times he pulled tracks out of service or entered
14 a slow order throughout his BNSF employment.

15 If any of the above elements has not been proved,
16 or if you find that BNSF is entitled to a verdict under
17 Instruction No. 19, then your verdict must be for Defendant
18 BNSF.

19 For activity to be protected under the FRSA, it
20 must be done in good faith. This requires Mr. Sanders to
21 prove by the greater weight of the evidence that, if he
22 engaged in protected activity by (A) providing information
23 or otherwise directly assisting in any investigation
24 regarding any conduct which Mr. Sanders reasonably believed
25 constituted a violation of any federal law, rule, or

1 regulation relating to railroad safety or security to a
2 person with supervisory authority over Mr. Sanders, or such
3 other person who had the authority to investigate, discover,
4 or terminate the violation, (B) refusing to violate or
5 assist in the violation of any federal law, rule, or
6 regulation relating to railroad safety or security, or (C)
7 reporting a hazardous safety or security condition, then he
8 undertook such activity honestly and frankly, without any
9 intent to defraud.

10 For Mr. Sanders to show that BNSF intentionally
11 retaliated against him by firing him due, in whole or in
12 part, to Mr. Sanders' protected activity or activities, it
13 is not enough for Mr. Sanders merely to establish that
14 BNSF's actions were unwise, unreasonable, or unfair.

15 For Mr. Sanders to show that BNSF intentionally
16 retaliated against him by firing him due, in whole or in
17 part, to Mr. Sanders' protected activity or activities, it
18 is not enough for Mr. Sanders merely to establish that his
19 protected activity and his firing occurred close in time to
20 one another.

21 Mr. Sanders may prove retaliation by pointing to
22 evidence of differential treatment of another employee if
23 the employee is similarly situated to Mr. Sanders. To
24 establish that another employee is similarly situated to
25 Mr. Sanders, it is necessary to show that he and the other

1 employee were similarly situated in all relevant respects.
2 This means that the individual used for comparison must have
3 dealt with the same supervisor, have been subject to the
4 same standards, and engaged in the same conduct without any
5 mitigating or distinguishing circumstances. Furthermore, to
6 be probative evidence of pretext, the misconduct of a more
7 leniently disciplined employee must be of comparable
8 seriousness.

9 You have heard evidence of findings of the
10 National Railroad Adjustment Board ("NRAB") and the
11 Occupational Safety and Health Administration ("OSHA") about
12 Mr. Sanders' termination from BNSF. You may consider these
13 determinations as relevant evidence. However, these
14 determinations are not binding on you. You, as the jury,
15 have an independent obligation to decide whether the matters
16 presented here for your determination have been proved or
17 not.

18 Only if Mr. Sanders proves the essential elements
19 described to you in Instruction No. 13, then you must also
20 consider whether BNSF would have fired Mr. Sanders
21 regardless of Mr. Sanders engaging in protected activity.
22 Your verdict must be for BNSF if it has been proved by clear
23 and convincing evidence that BNSF would have fired
24 Mr. Sanders even if Mr. Sanders had not engaged in protected
25 activity by (A) providing information or otherwise directly

1 assisting in any investigation regarding any conduct which
2 Mr. Sanders reasonably believed constituted a violation of
3 any federal law, rule, or regulation relating to railroad
4 safety or security to a person with supervisory authority
5 over Mr. Sanders or such other person who had the authority
6 to investigate, discover, or terminate the violation, (B)
7 refusing to violate or assist in the violation of any
8 federal law, rule, or regulation relating to railroad safety
9 or security, or (C) reporting a hazardous safety or security
10 condition.

11 Plaintiff Donald Sanders must prove his claim by
12 the "greater weight of the evidence."

13 A fact has been proved by the greater weight of
14 the evidence if you find that it is more likely true than
15 not true.

16 Defendant BNSF's defense must be proven by "clear
17 and convincing evidence." Clear and convincing evidence
18 means that the thing to be proved is highly probable or
19 reasonably certain. Clear and convincing evidence requires
20 a higher degree of persuasion than the greater weight of the
21 evidence.

22 You probably have heard the phrase "proof beyond a
23 reasonable doubt." That is a stricter standard than both
24 the "greater weight of the evidence" standard and the "clear
25 and convincing evidence" standard. The "proof beyond a

1 reasonable doubt" standard applies in criminal cases, but
2 not in this civil case, so put it out of your mind.

3 If you find in favor of Plaintiff under
4 Instruction No. 13 and if you do not find in favor of
5 Defendant under Instruction No. 19, then you must award
6 Mr. Sanders such sum as you find will fairly and justly
7 compensate him for any of the following damages you find he
8 sustained as a result of BNSF's firing of Mr. Sanders.
9 Mr. Sanders' claim for damages includes the following types
10 of damages, and you must consider them separately.

11 First, you must determine the amount of wages and
12 fringe benefits Mr. Sanders has proved by the greater weight
13 of the evidence he would have earned in his employment with
14 BNSF if he had not been discharged on April 29th, 2016,
15 through the date of your verdict, *minus* the amount of
16 earnings and benefits Mr. Sanders received from other
17 employment during that time.

18 Second, you must determine the amount of damages
19 for emotional distress, if any, that you find Mr. Sanders
20 has proved by the greater weight of the evidence were caused
21 by BNSF's termination of him. Emotional distress must be
22 supported by competent evidence of genuine injury.
23 Emotional distress damages need not be supported by medical
24 or other expert evidence. A plaintiff's own testimony,
25 along with the circumstances of a particular case, can

1 suffice to sustain the plaintiff's burden in this regard.

2 You must enter these amounts as separate items on
3 the verdict form and must not include the same items or
4 amounts in more than one category.

5 Remember, throughout your deliberations, you must
6 not engage in any speculation, guess, or conjecture, and you
7 must not award damages under this instruction by way of
8 punishment or through sympathy.

9 You are also instructed that Mr. Sanders has a
10 duty under the law to "mitigate" his damages -- that is, to
11 exercise reasonable diligence under the circumstances to
12 minimize his damages. If you find that BNSF has proven by
13 the greater weight of the evidence that Mr. Sanders failed
14 to seek out or take advantage of an opportunity that was
15 reasonably available to him, then you must reduce his
16 damages by the amount he reasonably could have avoided by
17 taking advantage of such an opportunity.

18 Thank you for your attention to those
19 instructions.

20 Ms. Morton, at this time should we invite the
21 court security officer up to --

22 MR. JAMES KASTER: Your Honor, can I be heard
23 briefly?

24 THE COURT: Certainly.

25 MR. JAMES KASTER: Just on page 21, Instruction

1 14, I believe there's -- in the second sentence that the
2 word "if" was inserted and doesn't belong there.

3 THE COURT: Sorry, Mr. Kaster. Where did I put
4 "if"?

5 MR. JAMES KASTER: "This requires Mr. Sanders to
6 prove by the greater weight of the evidence that he engaged
7 in protected activity by" The "if" is --

8 THE COURT: Correct.

9 MR. JAMES KASTER: So a small point, but I thought
10 it should be corrected. Thank you.

11 THE COURT: Thank you for correcting that and
12 catching it.

13 Members of the Jury, if you would, please, note
14 that correction on your copy of the instructions.

15 MR. JAMES KASTER: Thank you, Your Honor.

16 THE COURT: Thank you.

17 All right. At this --

18 A JUROR: Your Honor (inaudible) --

19 THE COURT: Certainly. Can I repeat it, did you
20 say? Yes. It's at page 21, second line. It should read:
21 "[R]equires Mr. Sanders to prove by the greater weight of
22 the evidence that he engaged in protected activity ..., " so
23 the comma and the "if" can be removed.

24 (Pause - Court is reviewing)

25 THE COURT: All right. Mr. Kaster, I'm going to

1 disagree with you.

2 MR. JAMES KASTER: Oh.

3 THE COURT: There's an "if" and a "then" there --

4 MR. JAMES KASTER: Oh, oh --

5 THE COURT: And that was deliberate on my part.

6 MR. JAMES KASTER: -- my misreading then.

7 THE COURT: There's an "if" and a "then," "if he
8 engaged in protected activity ... "then," second to the last
9 line there.

10 MR. JAMES KASTER: Okay. I misunderstood. My
11 fault.

12 THE COURT: All right. So, Members of the Jury,
13 the easy way to do this is for me to say never mind --

14 (Laughter)

15 THE COURT: -- but let's all be on the same page
16 here. Make sure that -- just leave it as it was originally,
17 or make a note to yourself on your copy of the instructions
18 that that instruction was correct as originally read. Thank
19 you.

20 MR. JAMES KASTER: And I'm sorry for that, Your
21 Honor.

22 THE COURT: That's all right. It happens.

23 All right. Ms. Morton, let's call up the court
24 security officer and swear him in if we could, please.

25 (Oath administered to the court security officer by the

1 courtroom deputy)

2 COURT SECURITY OFFICER: I do.

3 THE COURT: Thank you. Mr. Marshal, if you would
4 escort the jury to the jury room, please.

5 (Jury excused)

6 THE COURT: All right. Please be seated,
7 everyone. Do we all have a way to contact you and you've
8 all got instructions on --

9 MR. JAMES KASTER: Yeah, we all filled that out.
10 How long will the jury go today? Is that up to them?

11 THE COURT: It's sort of up to them. My plan was
12 to at least keep them here until 5 o'clock, but we'll let
13 you know when they're excused. And I can't -- unless
14 something strange happens, I can't imagine keeping them past
15 5:30.

16 Let's talk about tomorrow morning for just a
17 second. What we've asked the jury to do because it's what
18 we've been instructed to do by the marshal is that they
19 report to the employee entrance downstairs after 9:10 or so,
20 9:05, 9:10 and before 9:20. That way they're there after
21 the rush of folks. So I do not expect them to begin their
22 deliberations tomorrow morning until some point after about
23 9:20 or so.

24 MR. JAMES KASTER: What time is the plea?

25 THE COURT: 9 a.m. if it's on time.

1 And I'm informed also that the skyway entrance
2 tomorrow morning will be closed, so if that's how you
3 typically arrive at the courthouse, just know that that will
4 not be an option. If you arrive about that time, you'll
5 have to go through the front door.

6 MR. JAMES KASTER: Thank you.

7 THE COURT: All right. Depending on the verdict,
8 I'm going to get back here to work on the punitive damages
9 question. And I guess one thing that we haven't talked
10 about -- but I'm going to ask the parties if they have a
11 preliminary view of at this point -- is: If they come back
12 with a verdict for Mr. Sanders and if I allow that punitive
13 damages question to go to the jury, what's your expectation
14 as to how much time or argument or what have you that you
15 would need before we present that to them?

16 MR. JAMES KASTER: My expectation based on past
17 practice, Your Honor, is that the jury would get the
18 financial condition additional information and we would
19 argue. How much time would that be? Half hour, 45 minutes
20 a side. That's it. There's no additional testimony that we
21 would ask for.

22 THE COURT: And does BNSF agree, again, provided
23 those two conditions are met?

24 MS. DONESKY: I will just estimate about an hour,
25 I suppose, in time.

1 THE COURT: For total or for you?

2 MS. DONESKY: Well, you said 45 each side, right,
3 Jim?

4 MR. JAMES KASTER: I said a half hour, 45 minutes
5 a side.

6 MS. DONESKY: A side, correct, yeah. So I'd be
7 around -- I guess we'd be 45 or so, similar, to an hour.

8 THE COURT: All right. That's helpful to know in
9 advance just for our planning purposes.

10 All right. We will stay in touch then and I'll
11 adjourn at this point. Please feel free to contact to
12 Ms. Morton if you have any questions.

13 Thanks, everyone.

14 MR. JAMES KASTER: Thank you.

15 (Jury excused to deliberate at 3:31 p.m.)

16 (Recess)

17 (Jury adjourns deliberations at 5:30 p.m. for the day)

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I N D E X

	<u>PAGE</u>
Jury Instructions Conference	1104
Defendant Rule 50 Motion	1226
Argument re: Request to Admit OSHA Record	1226
FURTHER Jury Instructions Conference	1232
DEFENDANT'S Closing Argument	
By Ms. Donesky	1248
PLAINTIFF'S Closing Argument	
By Mr. Lucas Kaster	1307
JURY INSTRUCTIONS	
By the Court	1307

W I T N E S S E S:**ANDREW L. SHEARER**

Direct Examination by Ms. Ferguson	1141
Cross-Examination by Mr. Lucas Kaster	1158
Redirect Examination by Ms. Ferguson	1179

STEPHANIE M. DETLEFSEN

Direct Examination by Ms. Donesky	1180
Cross-Examination by Mr. Lucas Kaster	1204
Redirect Examination by Ms. Donesky	1222
Recross-Examination by Mr. Lucas Kaster	1223

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E X H I B I T S

<u>NUMBER</u>	<u>FOR ID IN EVIDENCE</u>
Plaintiff 149	1145
Defendant 184	1156
Plaintiff 24	1165
Plaintiff 106, 115, 127	1167
Plaintiff 107	1171
Plaintiff 140	1175
Plaintiff 142	1176
Plaintiff 146	1177
Defendant 93	1196
Plaintiff 217	1217
Plaintiff 221	1220
Court 1	1225

C E R T I F I C A T E

I, **TIMOTHY J. WILLETTE**, Official Court Reporter
for the United States District Court, do hereby
certify that the foregoing pages are a true and
accurate transcription of my shorthand notes,
taken in the aforementioned matter, to the best
of my skill and ability.

/s/ Timothy J. Willette

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